BCI EXHIBIT

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555 (JMP)

08-01420 (JMP)(SIPA)

- -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.

Debtors.

- -x

In the Matter of:

LEHMAN BROTHERS INC.,

Debtor.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

December 22, 2008

10:14 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

I. UNCONTESTED MATTERS:

HEARING re Debtors' Motion for Entry of Order Pursuant to Sections 105 and 363 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2002, 6004, and 9019 (i) Authorizing Lehman Brothers Holdings Inc. to Enter into a Settlement Agreement with Certain French Affiliates Relating to Intercompany Claims, (ii) Authorizing Lehman Brothers Holdings Inc. to Vote Its Shares in French Affiliate to Approve Sale of Substantially All of the Assets of and Voluntary Dissolution of Such Affiliate and (iii) Granting Certain Related Relief

HEARING re LBHI's Motion, Pursuant to Sections 105(a) and 365 of the Bankruptcy Code, for Authorization to Assume Administrative Services Agreement with Aetna

HEARING re LBHI's Motion, Pursuant to Sections 105(a) and 365 of the Bankruptcy Code and Bankruptcy Rules 6006 and 9014, for Authorization to Reject Prescription Drug Program Master Agreement with Medco

II. CONTESTED MATTERS:

HEARING re Motion for Relief from Stay Motion of OMX Timber Finance Investments II, L.L.C. For Limited Relief from the Automatic Stay

HEARING re Debtors' Motion for an Order Pursuant to Section 365 of the Bankruptcy Code Approving the Assumption or Rejection of Open Trade Confirmations

HEARING re Debtors Motion to (A) Establish Sales Procedures; (B) Approve a Seller Termination Fee and a Reimbursement Amount; and (C) Approve the Sale of the Purchased Assets and the Assumption and Assignment of Contracts Relating to the Purchased Assets

SECURITIES INVESTOR PROTECTION CORPORATION PROCEEDINGS:

III. CONTESTED MATTERS:

HEARING re Trustee's Motion under 11 U.S.C. 105 and 363 and Fed. R. Bankr. P. 9019(a) for Entry of an Order Approving Settlement Agreement

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P R O C E E D I N G S

THE COURT: Please be seated. Mr. Miller, you look even taller in person.

MR. MILLER: Thank you, Your Honor. Must be the weather. Must be the weather. Good morning, Your Honor.

THE COURT: Good morning.

MR. MILLER: With Your Honor's permission, may we take the SIPA proceeding, item number 9 (sic) on the agenda, first?

THE COURT: Sure.

MR. MILLER: Mr. Kobak?

MR. KOBAK: Thank you, Your Honor, and good morning, Your Honor. It's James B. Kobak, Jr. of the firm Hughes Hubbard & Reed representing -- on behalf of the trustee, Mr. Giddens, in the SIPA proceeding. Before you today, Your Honor, is a motion seeking approval for a settlement agreement between Barclays and JPMorgan and the trustee for a transaction that, in effect, completes a significant part of the purchase agreement approved by this Court.

This settlement involves a transaction sponsored by the Federal Reserve Board of New York to try to accomplish a wind down of LBI's business and an orderly transfer of accounts as explained in the declaration of Ms. Leventhal of the Fed. Although it has a large monetary value, it actually only has a positive impact on LBI's estate because of the declining value

of securities being transferred against an obligation of seven billion dollars or more.

The facts are set forth in uncontroverted affidavits or declarations, principally, Ms. Leventhal's of the Fed as well as Mr. LaRocca's of Barclays. And I'll only briefly summarize here.

THE COURT: I've read the declarations.

MR. KOBAK: All right.

THE COURT: But you may wish to advert to particular sections of them for emphasis or for the benefit of the record.

MR. KOBAK: Sure, Your Honor. Well, let me just explain. At the time of the purchase agreement, Barclays had loaned LBI forty-five billion dollars. And Barclays was to receive securities valued at over forty-nine billion dollars to cancel the loan. Under the purchase agreement approved by Your Honor, that party became a significant part of what Barclays obtained under the agreement, the agreement that this Court approved and that allowed tens of thousands of customer accounts to be transferred. For various operational reasons, the great bulk of securities was transferred on the evening of the 18th but approximately seven billion dollars as then valued could not be. Cash was supposed to be transferred as a temporary substitute but as described by Ms. Leventhal and Mr. LaRocca, the circumstances did not allow that and the SIPA proceeding intervened. The cash ended up at JPMorgan to which

LBI had and still has very substantial indebtedness. Barclays never received the securities which it was supposed to receive which everyone expected it to receive and which the Court's order entitled it to receive. Neither did it receive the cash substitute.

In essence, the settlement before Your Honor today completes this part of the transaction by transferring securities and to the extent they had already been liquidated or already declined in value, some additional cash from JPMorgan. I want to make it clear that the settlement doesn't affect anything else in the purchase agreement or anything else that happened in the time preceding LBI's filing under SIPA. It doesn't determine any issues of interpretation, possible reformation under anything else under any other provisions of the purchase agreement and clarification letter. The trustee, for example, may well have disputes with Barclays and others over other provisions and other aspects of the agreement. We tried to make that clear in paragraph 32 of our application where we said that the trustee is not taking a position on or conceding anything else and that there is much, as Your Honor knows, that we intend to investigate on his behalf.

We have a clarifying amendment, which at the end of remarks, if Your Honor permits, I'll hand up to Your Honor, that spells out this point even more clearly for the avoidance of doubt.

THE COURT: When you say clarifying amendment, is that of the order?

MR. KOBAK: Of the order. I'm sorry, Your Honor.

THE COURT: Okay.

MR. KOBAK: And I think that satisfies or may satisfy the objections of Royal Bank and anyone else who, even though they haven't filed a paper has expressed any reservations other than the creditors' committee --

THE COURT: Has that language been shared --

MR. KOBAK: -- and the Chapter 11 --

THE COURT: Has that language been shared --

MR. KOBAK: Yes, it has. Yes, it has, Your Honor.

THE COURT: Okay.

MR. KOBAK: I want to note that this Court specifically reserved a 40 to compel delivery of purchased assets to Barclays and otherwise to implement and enforce the terms of the purchase agreement under paragraph 20 of the Court's order approving the sale. That order is incorporated in the SIPA proceeding through the separate order that Your Honor also entered in our case on September 19th. If the trustee refused to implement this settlement, he or JPMorgan or both could well be required to transfer a full seven billion dollars of cash or property plus possibly substantial interest to Barclays whereas, as Mr. Moore of the Fed states in his uncontroverted declaration, the value of the securities

involved is substantially less than the value attributed to them for settlement purposes.

I also note that every security that will be transferred had already been pledged by LBI by September 19th and was contemplated to be transferred in the purchase agreement. So no creditor can really claim that this changes anything. And, indeed, we learned over the weekend that the CUSIP claim -- or in which Royal Bank of America is interested in fact isn't included in the schedule of securities that's going over as part of this agreement.

I want to make clear that the trustee undertook a very careful consideration of this settlement and the factual bases that are set forth in their affidavits by Ms. Leventhal and Mr. LaRocca. The trustee and his lawyers and accountants met several times with representatives of other parties and with the Fed to ask questions and make sure we understood the facts and the circumstances. Mr. Caputo, on behalf of SIPC, who's in court today and I believe would like to make a few remarks when I'm done, participated in or oversaw a good deal of that activity.

Barclays and their attorneys, particularly, frequently remind us, and I'll advert to this in a minute that this matter has considerable urgency because of the market risk involved with the securities that are being transferred, and as they remind us, we first met with them back in October which is

more than five weeks before we filed this motion. But despite the importuning of the parties, we insisted on asking questions and looking at the facts and circumstances, a process that took until early December. We also insisted that attorneys for Mr. Miller and other attorneys for LBHI and Alvarez & Marsal be informed of the settlement terms and have opportunities for meetings and to obtain information all of which has occurred. We provided information to LBIE informally and to Linklaters which was acting as its counsel.

The trustee thinks that this settlement clearly falls within the range of reasonableness and meets the standards for approval under Bankruptcy Rule 9019. It's far above the low point of reasonableness. As noted, we feel that there's a good possibility that the Court could order this transfer or even a more costly one by the estate under paragraph 20 of the order approving the sale. The estate could be diminished by a full seven billion dollars and perhaps considerable interest. And on top of all that, the estate would have to bear the considerable expense and disruption of potentially a major litigation.

And again, I just want to make it clear that what this settlement really accomplishes is completing the very transaction contemplated in the purchase agreement as approved by this Court. And as Ms. Leventhal and the Fed note, this is also a transaction that bears with it a considerable amount of

public interest.

There is urgency here because of the market risk involved with the securities. From the trustee's point of view, it's urgent because if the agreement is not approved by the Court and signed by the trustee, it could be terminated by the other parties as early as tomorrow and that would have all the adverse consequences that I've outlined.

Only two sets of papers purporting to be objections to the settlement have been -- to the motion have been filed. And as I said, I think that we have been able to resolve one of them with some language which I'll have to hand up to Your Honor in a minute. We've also provided, as I indicated, information that I think resolved any concerns that LBIE may have had.

The one remaining objection, as I understand it, is the objection of the committee in the Chapter 11 case. And their objection, as I understand it, is primarily that they seek extensive information about some background facts leading up to the transaction. The information that they seek we think really has nothing to do with this aspect of the purchase agreement itself and it's just using this motion as a vehicle either to reopen the Court's approval of the purchase agreement or to investigate unrelated claims and transactions. We think it's too late to do the former and with respect to the latter, nothing in the motion or the proposed order forecloses any

investigation or claims that might be made about anything else. And as I've said, the trustee himself intends to investigate some of these matters himself.

I also want to make clear for the record that we do not believe that the creditors' committee should be considered a party in interest or to have any special status in the SIPA proceeding where, among other things, SIPA already plays substantial oversight roles.

And as I mentioned, I do have a blackline which I'll be happy to hand up to Your Honor if Your Honor wishes to see it which does have some clarifying language making clear that this really doesn't affect the rights as to other matters of other parties.

THE COURT: Thank you. This hearing was noticed as an evidentiary hearing. Do you assert that the declarations in support of this motion constitute the evidentiary record on the basis of which relief should be afforded?

MR. KOBAK: We do, Your Honor.

THE COURT: Is there anyone who has requested an opportunity to examine or cross-examine further the witnesses whose declarations have been offered?

MR. KOBAK: Not as far as I'm aware, Your Honor.

THE COURT: Let me ask openly in court right now if there's anyone who wishes to examine any of the declarants. Hearing no response, I'll deem that to be a no. And I will

accept the declarations of each of the witnesses, notably the declaration of Shari Leventhal which provides considerable detail concerning the circumstances of this transaction.

Let me ask you a question before hearing from counsel for Royal Bank and the committee who appear to be the only objectors at this point. Both objections, as I read them, assert a somewhat common theme. Royal Bank, and I probably distort their position by characterizing it simply, say we shouldn't be bound by somebody else's settlement. The creditors' committee, and I make the same comment about not attempting to characterize their remarks by this shorthand, we need some more time to investigate further the circumstances of this extraordinarily complex transaction that was approved in such a hurry. And we're concerned that if it's approved now, we may not have access to all the facts with which to assess the reasonableness of the trustee's business judgment in saying yes to this now. Is that a fair characterization?

MR. KOBAK: I think it's a -- I mean, I'll let them speak for yourself (sic), Your Honor, but I think that's a fair characterization.

THE COURT: Okay. That said, one of the questions I have is this. Assuming that I approve this and we later discover that despite the utmost good faith on the part of everybody involved and the reasonable skill and insight of those involved, that another mistake is uncovered. I'm not

calling this a mistake as much as something -- it's a seven billion dollar item which, even in this case, is not a rounding error. And let's just say that there's a recognition upon further diligence that there's a need for further adjustment. How can that be affected if this settlement is approved today?

MR. KOBAK: Well, Your Honor, first of all, I know mistakes can happen but I don't think that's going to happen. I don't even think Royal Bank of America's security is involved in the securities that are going over. So I think that's basically a nonissue. Again, this is all securities that were supposed to go over on September 19th. So, in essence, it's a transaction that's already been approved. Now, it certainly doesn't take away any rights that people have as -- in our proceeding anyway, as of September 19th. Our universe is kind of fixed as of that date.

THE COURT: Okay.

MR. KOBAK: May I hand up the blackline, Your Honor?

THE COURT: Do you want me to read it now --

MR. KOBAK: Well, I guess --

THE COURT: -- or you want me to just have it.

MR. KOBAK: I think Your Honor should have it. I don't know if the other parties will refer to it.

THE COURT: Certainly you may approach and hand it up.

MR. KOBAK: Thank you, Your Honor.

THE COURT: Thank you.

MR. KOBAK: And, Your Honor, I believe Mr. Caputo of SIPC would like to say a few words in support of the motion. And it may be that some of the other parties would also like to be heard.

THE COURT: All right. Well, given the fact that we're dealing with those who support the motion first, why don't we just hear from those. And then we'll hear from the objectors. And then we can try to wrap this up.

MR. KOBAK: Right. Thank you, Your Honor.

MR. CAPUTO: Good morning, Your Honor.

THE COURT: Mr. Caputo, good morning.

MR. CAPUTO: Kenneth Caputo on behalf of the Securities Investor Protection Corporation. Your Honor, SIPC has reviewed the trustee's motion and the settlement agreement. As Mr. Kobak stated, we've met with and engaged in numerous comprehensive discussions with various parties among others, the trustee, the parties to the settlement agreement, the New York Fed, representatives of the LBHI and the Securities and Exchange Commission. We've discussed the facts and circumstances leading to the dispute between the parties, the content and parameters of the settlement agreement and the present motion seeking its approval.

SIPC has reviewed the matter in accordance with its oversight role in the SIPA liquidation proceeding of LBI and,

specifically, pursuant to SIPA Section 78EEE(d) which makes SIPC a party by right to all matters within the liquidation proceeding.

We've also reviewed the settlement agreement and the motion in light of the guidelines set forth under Bankruptcy Rule 9019 and the six factors considered by courts in the Second Circuit under 9019 as set forth in such cases as In re WorldCom and In re Ashford Hotels. In that regard, Your Honor, SIPC has considered first that absent approval of the settlement agreement, the parties would likely engage in complex, expensive and potentially lengthy litigation that would burden the estate.

Second, the probability of success on the merits for either party is not clear. But what is clear is that if litigation were to ensue, both parties would vigorously defend their positions which lends support to the conclusion that the exchange of the consideration contemplated by the settlement agreement may reasonably be determined to be due and owing under and after such litigation.

Third, the parties have agreed to exchange mutual general releases making settlement agreement a fair resolution of outstanding claims between the parties.

Fourth, creditors generally support the motion. That includes two of the largest creditors of the estate of LBI, of course, the parties. LBHI has not objected. And SIPC, which

stands to be one of the largest creditors in the estate, is standing in support.

Fifth, the settlement agreement represents a fair and beneficial outcome for the estate especially given what Mr. Kobak alluded to a couple of times which is the market risk of the securities in Annex A.

Finally, Your Honor, and sixth, the settlement agreement is the product clearly of significant arm's length negotiation between the parties. So all of the factors the Courts have considered in approving settlement agreements in this circuit have been met, we believe.

Very simply, Your Honor, based upon the foregoing, we determined and we believe that resolution of the issues as set forth under the settlement agreement and in the motion is in the best interest of the estate of LBI, its creditors and interested parties. And we respectfully recommend that the Court approve the motion.

THE COURT: Mr. Caputo, thank you for those remarks. Let me just ask you if you can endeavor to describe what this litigation would look like that's being settled. One of the things that is, frankly, not clear to me from the papers I have reviewed at least to this point is precisely what is being settled in terms of the claims and defenses that are before the Court in the settlement agreement. And based upon the presentation that has been made, this appears to be the

reasonably contemplated completion of the transaction that was before the Court on September 19th.

MR. CAPUTO: Right.

THE COURT: To that extent, it would seem that there wouldn't be much to be arguing about. What is the estate giving up, if anything, in achieving this settlement other than avoided cost?

MR. CAPUTO: We giving certainty to the estate because it would undoubtedly be the case that if the settlement agreement were not approved that a claim would be made against the estate for far more, at least the seven billion if not costs contemplated in relation thereto. So the estate gains by the settlement is a certainty of what was contemplated in the APA and in the paragraph 20 of the order that was entered approving the sale on 9/19 and then thereafter 'cause, I believe, 9/20, 1, 2, 3, etcetera.

So what litigation would entail would be a recitation of and a delving into all of the facts and circumstances that were in existence on the 18th and the 19th leading up to the APA. That would be detailed, voluminous. It would be lengthy. So if I'm answering the question correctly, I think what you're getting here is a certainty for the estate of what would undoubtedly be a very large claim against the estate. And the certainty is that the assets contemplated to be distributed and delivered, even as of 9/19, would indeed now be delivered and

both JPMorgan Chase, of course, and Barclays will walk away from any of those claims they would have against the estate and that's a significant benefit.

THE COURT: Okay. Thank you. Is there anyone else who wishes to speak in support of this proposed settlement?

MR. MILLER: If Your Honor please, Harvey Miller, on behalf of the Chapter 11 debtors. I don't rise, Your Honor, in the context of support but rather no objection. This is a compromise and settlement, Your Honor, in which the Chapter 11 debtors have a very significant interest. Just to give Your Honor some background, LBI, the SIPC debtor, has substantial collateral which was posted with JPMorgan Chase. In connection with the resolution of claims that JPMorgan Chase may have against the LBI estate, the Chapter 11 debtors and, in particular, Your Honor, LBHI likewise posted a considerable amount of collateral security consisting of cash and securities. As the claim of the bank against LBI is processed and settled, Your Honor, and that collateral is used to settle that claim, if that collateral is insufficient then JPMorgan Chase will look to the collateral that LBHI has posted. So there was a very significant interest in this transaction, Your Honor. And we spent a considerable amount of time with the SIPC trustee, with the staff, with the former Lehman people in going through the facts relating to this transaction. And it's very significant, Your Honor, because in addition to the

transfer of the securities which are alluded to as having a value, at some point in time, of 5.7 billion dollars in round figures. The assertion in the declarations is that those securities are now worth substantially less than 5.7 billion dollars. But to make up what is facially the seven billion dollars, an additional one billion 250 million dollars of cash is going over to Barclays if you approve the settlement. And that was very significant, Your Honor, to the Chapter 11 debtors and Mr. Marsal. And I can't tell you, Your Honor, how much time we have spent on this with the cooperation of Mr. Giddens as the trustee.

There are still facts, Your Honor, that have to be determined. So when Mr. Kobak refers to the facts stated in declarations as being uncontradicted, we understand the spirit of the settlement, Your Honor. We understand what was to be contemplated and to be performed under the asset purchase agreement. And this is within the spirit of that agreement.

However, Your Honor, we were very concerned that something would occur in this compromise and settlement which would preclude future discovery, future determination, that perhaps some assets were transferred to Barclays that may not have been transferred to Barclays (sic) and, as Your Honor knows, this is tripartheid settlement and there may be some relationships with JPMorgan Chase in which LBHI and the related Chapter 11 debtors may have some claims, or they may not have

some claims. But we were very concerned, Your Honor, in the shortness of time between the filing of this motion and the time to do some discovery and, as I said, Your Honor, a lot of discovery, informal discovery, was done, Your Honor, the considerations were raised with Mr. Giddens as the trustee, raised with Mr. Novikoff as the attorney for JPMorgan Chase. And as I understand it, even though Mr. Kobak refers to the facts alleged in the declarations as being uncontradicted, all rights are reserved by all parties as I understand the order. And there is nothing in this that presents collateral estoppel with a binding effect in any future proceedings. So when Your Honor mentioned in the future, there is still a great deal of work being done by the unsecured creditors' committee in looking to the transfer of assets from all of the Chapter 11 debtors and LBI to Barclays.

So I don't think, Your Honor, as I understand the order, that that kind of discovery, the assertion of claims in the future, if there are any claims, are precluded by the approval of this compromise and settlement. And it's on that basis, Your Honor, that the Chapter 11 debtors do not object to this compromise and settlement.

THE COURT: Fine. Thank you very much.

MR. MILLER: Thank you.

THE COURT: And I'd like others who are parties to the settlement to confirm that what you've just said is their

understanding as well. If it's not, I want to know what differences may exist.

MR. SCHILLER: Jonathan Schiller for Barclays Capital. That is our understanding and we confirm what Mr. Miller has brought before Your Honor.

We have some other points but I believe the reserved ones should be heard first --

THE COURT: Okay.

MR. SCHILLER: -- with Your Honor's permission.

MS. LEVENTHAL: Good morning, Your Honor. Shari Leventhal for the Federal Reserve Bank of New York. The salient facts of how this settlement came to be are set forth in my declaration. And as has been stated a number of times are not being contested here today. Of course, if you have any questions, Your Honor, I'm prepared to address those. But if not, I would like to note again that the Federal Reserve Bank of New York believes that the interest of fairness dictate that this settlement should be approved. And I'd like to highlight a few of the reasons why.

Barclays stepped in as the only party willing and able to purchase LBI's assets. Your Honor acknowledged that in approving the asset purchase agreement. Part of that ability included the ability to step into the Fed's shoes and fund LBI's payroll and operations. And Barclays did this on the night of September 18th. The plan was for Barclays and LBI to

execute or reverse repo transactions whereby Barclays would fund LBI to the tune of seven billion dollars. And -- I'm sorry, to the tune of forty-five billion dollars and received 49.7 billion dollars in securities. Because of the operational difficulties that I highlighted in my declaration, that reverse repo transaction changed. And, in fact, Barclays paid thirty-nine billion dollars and received 42.7 billion dollars in securities. The seven billion dollar differential went into an account at JPMorgan Chase for Barclays but somehow it ended up in LBI's account and didn't remain in Barclays' account. Those funds were Barclays' on the night of September 18th, the early morning of September 19th. And as the Court noted, this was the transaction that was contemplated in the asset purchase agreement.

As Mr. Kobak noted, the estate could face a claim here in excess of seven billion dollars. By our calculations, I believe the interest on seven billion dollars is something in the range of around thirty-five million dollars a month. So if this settlement is not approved, we're talking about a sizeable cash claim against the estate. And, in fact, what the estate gains here is it has 5.7 billion dollars in cash remaining in the estate in exchange for giving up securities that have a value that's been noted both in the declarations and here today as being far less than that.

Seven billion dollars is a lot of money at any time.

But it's particularly so in the current economic climate. The parties with the Federal Reserve's assistance have been working diligently to reach a resolution of this matter. And while the delay in bringing this matter to the Court may seem to negate a sense of urgency, as Mr. Kobak and Mr. Caputo noted, there is a continuing and substantial market risk that the securities are going to decline. And it's important, therefore, that the settlement be approved as expeditiously as possible. As the host country supervisor for Barclays, we believe it's important that Barclays get its money. In conversations with the FSA, the home country regulator, they believe the same. And, therefore, we ask Your Honor that the settlement be approved as soon as possible. Thank you.

THE COURT: Thank you.

MR. NOVIKOFF: Good morning, Your Honor. Harold Novikoff, Wachtell, Lipton, Rosen & Katz on behalf of JPMorgan --

THE COURT: Good morning.

MR. NOVIKOFF: -- Chase Bank, N.A. Good morning, Your Honor. We are a party to and support the settlement that's currently before the Court. As has been noted, this is essentially designed to achieve what was intended by the parties to occur during the period on September 18th and 19th to complete a delivery of securities that was intended at that time which, largely due to operational issues, simply did not

occur.

JPMorgan's interest in this matter are largely aligned with those of LBI and, indirectly, with the LBHI estate in that all of us have an interest in maximizing the value of the collateral pool that is held by JPMorgan to cover the obligations owing to it by LBI, particularly, those arising from the clearance advances pre-petition. These securities, if they are not delivered to Barclays Capital, remain in that collateral pool and would essentially have to be liquidated in order to achieve a payment and realize their value. In looking at it, we believe that, from JPMorgan's economic perspective, which, as I noted, is aligned with those of the two estates, we feel it is far better at this point to deliver those securities, the entire settlement consideration here to Barclays Capital, than to retain those derived value from them but run a risk of -- a serious risk of a claim which could result in seven billion plus of real value going to Barclays Capital.

With respect to the timing, Your Honor, we believe that any further delay here is potentially harmful. As I noted, these securities right now are shown as property of LBI in which JPMorgan holds a security interest. These securities are not like fine wine. They do not improve over time in an adverse market. Particularly, many of these are mortgage-backed securities and they have been going down in value while

we've been putting the settlement into place. We would like to know now, I'm sure Barclays would like to know now, whether this transaction will be allowed to go forward. These securities were set aside at some time in October to allow this transaction to happen. The reality is, is the value during that period of time, is the reality is the value of the securities have gone down and we've got a market which, as Your Honor knows, is quite volatile. And there can be further drops in value. We want this to go forward now. We do not believe it should be held up by any tangential issues where, at this point, parties want to find additional information about the overall sales transaction.

We confirm Your Honor's understanding that what is being done here is we are approving a settlement agreement. There will not be any collateral estoppel or other similar effects. As to the facts laid out in the declarations or otherwise in the order or the motion, we are approving a transaction. People would remain free to pursue claims if they feel that there is something in the overall sales transaction which gives rise to a claim.

Essentially, what we're doing here at this point, Your Honor, is allowing a portfolio of securities and proceeds of sales of securities that previously have been set aside at this point to move. Nobody's going to lose the record of what moved or how it got there.

I would have more, Your Honor, to say about the Royal Bank objection although I understand that objection is going to be withdrawn and would reserve time if, in fact, my understanding is incorrect.

THE COURT: Fine.

MR. NOVIKOFF: Thank you, Your Honor.

THE COURT: Thank you, Mr. Novikoff.

MR. SCHILLER: Your Honor, briefly, Jonathan Schiller again on behalf of Barclays. The order that the trustee has put before you and which we've reviewed and to which Mr. Miller referred preserves rights, as Mr. Novikoff just explained. What will be final, Your Honor, is your approval of the settlement agreement and the intended transfer of the settlement securities and the settlement payment to Barclays. Your Honor has heard from both the Fed and JPMorgan about the risk of these securities in the marketplace. We have put before you through Gerard LaRocca, chief administrative officer of Barclays -- and Mr. LaRocca is here this morning, Your Honor.

THE COURT: Good morning, Mr. LaRocca.

MR. SCHILLER: In support of the motion to shorten time, I just want to draw the Court's attention to the second paragraph of Mr. LaRocca's declaration there where he said insofar as a settlement agreement contemplates the transfer to Barclays of those securities that remain from the Fed portfolio

that were originally intended to be transferred to Barclays pursuant to the transaction described in the declarations that accompany the motion before you, Barclays has been exposed and continues to be exposed to continued market risk associated with these securities at a time when the markets have been experiencing and considerable risk.

We regard the creditor committee objection, Your Honor, as not germane to your decision whether to accept this motion and approve the settlement. They want to exhume information related back to the sale. That is not pertinent and does not bear upon the question before you today. Thank you, Judge.

THE COURT: Mr. Schiller, before you --

MR. SCHILLER: Yes.

THE COURT: -- sit down, you may not be the right person to answer this question and Mr. LaRocca might be. And I just want you to know that before we close the record as to this aspect of this morning's agenda, I would like greater clarity than I currently have on a valuation question. And this is not just addressed to you. It's addressed to anybody who can answer it. I believe, if I'm understanding the transaction correctly, that the working premise of it is that the 1.25 billion dollars in cash consideration, which is going to Barclays, upon approval, along with the securities that have been identified, is intended to compensate Barclays for the

diminution in value over time of those securities such that Barclays is receiving the same seven billion dollars in value, assuming it's approved today and consummated tomorrow, that it would have received if the transaction had been consummated as contemplated in September. Am I right in understanding that? That's a premise that I have. I just want to confirm it. And then assuming that's correct, I want to know what the current value of the transaction is.

MR. SCHILLER: It's a bit different than that, Judge. The cash component is designed to address the liquidation of certain securities from the Federal portfolio that occurred. And it makes up for that portion of the securities.

THE COURT: As of what date?

MR. SCHILLER: As of the date --

THE COURT: I mean, recog --

MR. SCHILLER: -- the settlement agreement was entered. The liquidation occurred after the 19th and the values were established at the time the parties agreed in their settlement.

THE COURT: I'm still not clear on this. And I know a lot of people have spent a lot of time on it. I'm just trying to understand the basic math that is supposed to equal seven billion. It's 1.25 billion in cash plus a basket of securities equals seven billion, is that right?

MR. SCHILLER: That is, as Mr. Miller said, that's

the facial value. All the parties before you believe that the current value of those securities is below that. And that's why it would be a benefit to the estate to resolve it on this basis.

THE COURT: Understood. And I take it that while everybody represents, and I accept the representations, that this is a net benefit to the estate, no one is prepared on today's record to quantify what that benefit is.

MR. SCHILLER: Well, the evidence before you, Judge, submitted by the Fed by Mr. Moore is that the Federal securities, and I quote, "would be substantially less than the 50.62 billion". And that in paragraph 6 of his affidavit, he relates that the subject of the motion is going to be substantially less than the difference. And he does the math there. The precise value today of the securities in the Fed portfolio, I can't make a representation other than agreeing with Mr. Moore that the values have declined and are substantially below the seven billion dollar value.

THE COURT: Okay. All that I was really trying to get a sense of -- and it may be that the parties involved in this would prefer not to sharpen their pencils on this and prefer the record to speak for itself that it's substantially less and allow me to use my own powers of interpretation to assume that means a lot of money. But I don't know what we're talking about in terms of the order of magnitude. It may be

that I don't need to know that. But missing from the equation of determining that this is a 9019 settlement that warrants approval is the quantification of what that benefit actually is. It may be that parties would prefer that that not be part of the public record. I'd like to know it. And I'd be prepared to learn it through an in camera submission.

MR. SCHILLER: Very well, Your Honor. I would just add to that that the trustee, of course, with Deloitte, has looked at this as has Mr. Moore to make their representation to you. It doesn't offer the precision of the value that you're asking but it is testimony as to that number being less than the full value of the settlement.

THE COURT: I understand. I simply trying to get some sense. In a universe in which we're talking about seven billion dollars which is quite a lot of money --

MR. SCHILLER: Yes, sir.

THE COURT: -- I'm trying to understand what, in fact, is the value of what is being transferred to Barclays today.

MR. SCHILLER: If I may just take one minute, because it's an important question, confer with my client and Mr. LaRocca and see if there's something that we can throw a light on publicly at this point in time for you.

THE COURT: That would be helpful.

(Pause)

MR. SCHILLER: Your Honor, we are prepared to proffer through Mr. LaRocca off the record in camera the value of the securities that Barclays assigned on the night of the 19th.

THE COURT: Fine. Thank you. Is there anyone else who wishes to speak in support of the proposed settlement? All right. Let's hear from anyone who wishes to speak against it.

MR. KIRPALANI: Good morning, Your Honor. Susheel Kirpalani from Quinn Emanuel on behalf of the official committee of unsecured creditors of the Chapter 11 debtors.

THE COURT: Good morning.

MR. KIRPALANI: Your Honor, first of all, I want to thank you for letting me be heard at least to outline what our position is. I appreciate the offer to include in the proposed form of order language and all the representations that this would not be collateral estoppel. But I did want to explain to the Court, and I won't take up too much of Your Honor's time, exactly why did the committee feel it so necessary to appear on this particular settlement if, in fact, all rights are reserved and if, in fact, there's not supposed to be any collateral damage -- or, hopefully not damage but collateral estoppel.

Your Honor, I think the issues -- Your Honor knows better than I -- from the Friday night when you approved the sale going forward were thereafter spun into a whole variety of additional discussions and negotiations into Saturday and Sunday. And we did submit the declaration of Mr. Saul Burian

from Houlihan Lokey who was intimately involved in those negotiations. The sale order itself made the creditors' committee a party, if you will, to the transaction in the sense that it couldn't be changed without the creditors' committee's consent, even an immaterial change.

The transaction, Your Honor, did change. It changed and you heard about the changes. Your Honor yourself probably sees the numbers in the affidavit and went back and looked at your transcript and said that wasn't exactly the numbers that I remember being told on the Friday. At least that's the learning process I've gone through. And so, the question that we had when this has come before the Court in an emergency basis order to show cause three months after the transaction is these new numbers. If they're not footing with the numbers that were told to the creditors' committee during the weekend, why is that? And what are the right numbers? Because as of that late Sunday night, early Monday morning, our financial advisors were told that, look, this is the transaction that has to close. These are the numbers -- they're actually given a manila folder, which I photocopied here, that has all of the numbers that Mr. Burian outlined in his declaration. And it's for these reasons we need to go forward. Don't worry. There will be a reconciliation post-closing.

And so, here we are, three months hence and we assume that parties are busy, there's a lot of other things that need

to happen in the estate and we're not faulting anybody for that. But then when we see three declarations submitted by various parties to some settlement agreement that, although I say it's tangential, it was part and parcel of the transaction, Your Honor. I mean, I'm not going to use a microscope and say that this is something separate than the sale transaction. When we see declarations that have different numbers, different understandings than what people were told, we agree with the Court's comments that these aren't rounding errors. These are billions of dollars. And Your Honor mentioned that seven billion dollars is a lot of money. I would posit that five billion dollars is also a lot of money. And one of the major changes from that weekend was the securities or the assets that were being transferred to Barclays would need to be trued up that the value from Ms. Fife's comments on that Friday up until Sunday had gotten even worse than the 47.4 and that they have actually decreased now to forty-four or forty-five billion dollars. And Mr. Burian goes through that in his declaration.

And so, our request was simply that in addition to the language that Your Honor sees in the court order that by mid-January, at least, there be a final reconciliation of this mess of transactions. There are a lot of smart people who worked on it. But not everything -- in fact, close to nothing has come to light. And while we understand that the creditors' committee sits in the Chapter 11 case and this is the SIPA

proceeding, we thought someone should bring it to the Court's attention that Your Honor, I can tell from your questions, are asking, how do I know what the values are or who ascribed the value, as of what date, these are all the same types of questions that we've been asking. And we thought it's important to bring it to the Court's attention because, frankly, at the end of the day, Your Honor lowers the gavel and says this is a fair deal or not a fair deal. But without the right information or without understanding how numbers kept changing, I think it gives us a little bit of pause, Your Honor. And if what everybody in this courtroom is telling me is we want to get on with the agenda and you've made your point, all rights are reserved, all I would say is if the parties could agree to provide us with the information rather than force us to go through the hoops of filing a Rule 2004 against three different entities, yeah, that would be, I think, the most efficient way to proceed.

It's not that the information doesn't exist. The declarants are relying on something when they're making statements about assumed liabilities and asset values of particular dates. When people market to market securities, we want to make sure they didn't stick their finger in the air and say, hmm, five billion dollars additional assets, please, Lehman Brothers. And that's our concern. If everything turns out that it was a frenzied time but that, in fact, was the

market to market value as of that weekend and the transaction was permitted to close and had to close to save the various jobs that we're very happy that they did save, then that would be fine. But there are major discrepancies between what we were told that weekend and what's being put forth here today. Now, I understand none of that is part of the factual record which is comforting. When we filed our objection, that was not the case but I think that's now been made very clear. And what we have asked is, and we asked them on Friday, could we please get some final reconciliation of the numbers and Houlihan Lokey will work with Deloitte and work with Barclays. And the problem we face, which, I think, Your Honor has heard in other contexts is the critical people on Lehman Brothers' side don't work at Lehman Brothers anymore. And so, it's difficult that they were the ones who were assisting in the consummation of the transaction. They're not there anymore when the questions are to be asked. And we just want to get the final answer, Your Honor. That's really all we want.

THE COURT: When you asked the question on Friday about getting together and trying to work cooperatively to get to the bottom of all this, was there a response?

MR. KIRPALANI: Their response was we'll give you the language in the order and that's it. This morning, the parties did tell me that they would be happy to look at the list, it's five items, look at the list that Houlihan helped me put

together and we can talk about it sometime in mid-January. You know, I guess, that's where we are. They said they don't think it's appropriate for the Court to have to order them to comply and I said you're just causing us to file a motion to do that. It's hard to argue that the information shouldn't be made available. But, I guess, that's probably where we are. We'd have to file something if they don't give us the information.

THE COURT: All right. I'll just make the general comment. It's not a ruling and I'm not ordering anybody to do anything because there's nothing before me that leads to the entry of an order at least at this point other than an order with respect to the settlement agreement itself.

It's obviously in the best interest of orderly case administration that information be shared as promptly as it can be consistent with the other conflicting obligations that the financial advisors and lawyers have in this massive case with enormously complicated issues.

Nonetheless, I consider it to be important for us to get to what I'll call closure with respect to the basics of the transaction that was approved by order entered September 20th. And this motion with respect to the settlement agreement is a reasonable platform on which to address some of these issues because while this is not fairly to be characterized as a cleanup item, it's a very significant matter. It does draw all of our attention back to what happened in September. And I

think it important that there be reasonably prompt resolution of outstanding questions that the committee may have on the subject. I would hope that it's not necessary for the committee to have to file 2004 requests in order to get the information that it seeks which seems to be reasonable and consistent with its mandate.

As it relates to the issue of standing that has been alluded to during the course of this hearing and in your own remarks at the outset, by making this comment, I am not making any judgment as to the standing of the creditors' committee appointed in the LBHI case to participate actively and directly in the LBI case. But it is apparent to me that the transaction that was approved on September 20th was approved by means of two orders, one entered in the LBHI case and one entered in the LBI case. It is reasonable for the creditors' committee which represents substantial creditor interest in LBHI to have access to information so that it can fulfill its functions in the LBHI case.

Additionally, it appears to me reasonable for the LBHI committee not just in the context of what's before me now but in other settings to be a party in interest for purposes of major transactions affecting the LBI case.

This does not constitute a ruling with respect to standing. I do, however, note that these cases operate off the same agenda, very frequently have overlapping agenda items and

regardless of their actual procedural status as stand alone cases are in many material respects linked.

To the extent that there is a reasonable standing objection made at some point in the future by the LBI trustee, I'm prepared to consider it on its merits. But to the extent that the parties can work cooperatively, I consider that to be desirable and something to be pursued in good faith.

MR. KIRPALANI: Thank you, Your Honor. I appreciate your remark.

THE COURT: Whatever happened with Royal Bank? Mr. Ostrow, do you wish to make your way to the front of the room?

MR. OSTROW: Thank you, Your Honor. Good morning, Your Honor. Alec Ostrow from Stevens & Lee on behalf of Royal Bank America.

THE COURT: Good morning.

MR. OSTROW: Your Honor, Royal Bank America objected to this settlement on four grounds. One is that it didn't want to be bound and, in particular, drew attention to particular language in the order that said anyone who objects is deemed to consent. We objected to that.

We were also concerned that our particular property, collateral that was posted with Lehman Brothers Special Financing somehow made its way to Lehman Brothers Inc. and somehow made its way to Barclays might be affected in this particular transaction. And we didn't know whether it was or

it wasn't. And to the extent that it was and we had interest in it, we wanted those interests protected.

The other aspect to which we objected was that we just didn't see the basis for the compromise. Over the weekend I received a proposed revised order from counsel for the trustee. And this morning, I had an opportunity to speak with counsel for Barclays and counsel for JPMorgan Chase. And based on the discussions that I've had with that counsel and the things that were agreed to among counsel, I'm prepared to withdraw the objection.

And let me tell you what the things are. I haven't seen the precise order that was handed up to Your Honor and I would like to see a copy of it. But the deemed consent language that I had objected to is to be stricken and the limitation on the binding effect language that was inserted over the weekend is to be retained.

There is to be a representation by Barclays that Royal Bank's posted collateral, as we've described it in our papers, is not involved in this transaction at all. That upon the signing of appropriate confidentiality agreements we would be able to get complete access to the Schedules A and B to the asset purchase agreement and to Annex A to the settlement agreement. And that Barclays and JPMorgan Chase will provide to Royal Bank on a confidential basis information as to their banks -- to the extent that their banks acquired or disposed of

Royal Bank's posted collateral. With respect to JPMorgan Chase, that will take place after the first of the year. And David advised me that they can only trace me CUSIP numbers and that's acceptable to me. If that's acceptable to the other parties, then I'm prepared to withdraw the objection.

THE COURT: It sounds like it's a conditional withdrawal. Is there agreement that those conditions have been met?

MS. GRANFIELD: Lindsee Granfield, Cleary Gottlieb Steen & Hamilton LLP on behalf of Barclays Capital, Your Honor. I think Mr. Ostrow's recitation is correct. One little clarification or amendment may just simply be that obviously we were checking as to -- again, and something similar. He said with respect to JPMorgan, we can check on CUSIP number with respect to the CUSIP number that he has put in his objection and any securities that may be on different schedules. It is represented that that CUSIP number does not appear on Annex A to the settlement agreement. To the extent that it were to appear on schedules related to the clarification letter, we'll check whether that amount and that CUSIP is still at Barclays. That's what we agreed we would do and we will do that.

Obviously, if -- the CUSIP is the same, just as a clarification, doesn't mean that that's Royal Bank's posted collateral. That's a different question. But we will check and get that answer at least for Mr. Ostrow.

THE COURT: Thank you.

MR. NOVIKOFF: Your Honor, on behalf of JPMorgan, we confirm. I do want to clarify that what JPMorgan will do is determine from its records whether it believes that this CUSIP number was involved in a transfer of the amounts that were -- of the securities that were delivered to Barclays Capital on September 18th or whether it was a CUSIP that was contained in the clearance accounts on September 19th. I understand, if I understand the complaint properly, the security was originally posted as collateral in January of 2006. We are not going to be checking for some period of two and a half or two and three-quarter years on the security. But we will -- what we will endeavor to find out -- if that CUSIP was there during that period. Obviously, Your Honor, there is no assurance that that CUSIP on September 19th, if it was present, is in any way the same security that was posted in January of 2006.

THE COURT: Mr. Ostrow, does all of that satisfy you to the point of confirming that your objection is withdrawn?

MR. OSTROW: Yes, Your Honor. It does.

THE COURT: Thank you. The objection is deemed withdrawn.

MR. MILLER: Your Honor, please, Harvey Miller again. Your Honor, I just want to respond to something that Mr. Kirpalani said in connection with this particular transaction. We had two situations, Your Honor, the sale that you approved

by the order of September 19th and this particular transaction. I don't want Your Honor to believe that this was not part of discussions that occurred over the weekend of the 19th, the 20th, the 21st into early that Monday morning.

THE COURT: I think Mr. Kirpalani confirmed that, in fact, it was discussed over that weekend and Mr. Burian was part of those discussions.

MR. MILLER: The problem is, Your Honor, that at 3 or 4:00 in the morning, Mr. Burian had left. And the Houlihan Lokey people had left. And the Fed was present through telephone, Your Honor. JPMorgan was present. Barclays was present. The representatives of LBHI were present. And in those transactions, Your Honor, this seven billion dollars was an issue of extended discussion. And Your Honor has to remember that this goes back to what was a reverse repo that was done on the evening of the 18th. And normally, when that repo comes off in the morning, cash is exchanged, securities are released and so on. The 19th occurred; the securities were not there to deliver to Barclays in connection with that reverse repo. It was converted into purchased assets.

That's what happened, Your Honor. And at the closing -- and this, Your Honor -- there were very few people awake. They were lying on the floors and all over the place. And we were talking -- and as Senator Dirksen said, we were talking about real money. And it was very clear, Your Honor,

that Barclays was to either get seven billion dollars in cash or to get the securities that were to be released.

At that point in time, Your Honor, there was an election by Barclays, so to speak, that it would take the seven billion dollars in cash. It was under the impression that there was seven billion dollars in cash in a bank account at JPMorgan Chase. It turned out after the closing, Your Honor, that that bank account did not exist. So what has been happening over this period of time is the parties have been trying to resolve that difference. And while it's facially seven billion dollars, the representations that have been made all the way through these discussions, Your Honor, that that 5.7 billion dollar securities has eroded in value to a substantial sum that nobody wants to release publicly. But it's our understanding, on behalf of the Chapter 11 debtors, Your Honor, that it is significantly less than 5.7 billion dollars.

So what is really happening here, Your Honor, is the LBI estate is getting credit for seven billion dollars being paid to Barclays which reduces the claim that Barclays would have against that estate. That preserves value for the LBHI estate because the collateral that has been posted by LBHI will not be eroded to the extent of a full seven billion dollars. So there is real value here, Your Honor, to the LBHI estate. And that's the reason why we don't object to this.

And I would point out, Your Honor, the seven billion dollars is different than the APA. That seven billion dollars was a separate discussion. And there's no question in my mind, Your Honor, that Barclays thought it had seven billion dollars in cash in a bank account. It wasn't there. And that's what's being resolved today, Your Honor. Thank you.

THE COURT: Thank you. Is there anyone else who wishes to make any comments in connection with the proposed settlement agreement between the SIPA trustee, Barclays Capital and JPMorgan Chase Bank? I'll deem the record closed for purposes of both evidence and argument and I will approve the settlement based upon the record and the representations that have been made including the comments confirming that the settlement is not intended to have collateral estoppel impact that would preclude the further examination of the circumstances surrounding the original sales transaction between the estates and Barclays Capital approved by order entered September 20.

I accept the representations that have been made by the various parties concerning the benefit to the estate associated with this 9019 settlement notwithstanding the fact that the record is murky with respect to the quantification of the actual benefit. References have been made to the avoidance of the burden and expense of litigation but also to the fact that the notional amount applicable to the settlement

represents a significant but unquantified saving with respect to the amount that would be paid if we were counting out seven billion dollars in actual cash. That difference apparently is the current market value of the basket of securities that has been referenced during the course of today's hearing.

For reasons stated earlier during the course of the hearing, I am interested in learning what that delta is to the extent that it's possible to estimate what the actual benefit is in dollars recognizing that it is just that, an estimate, and not a precise calculation. But I do accept the statements that have been made by counsel for all parties and that no one has objected to that this settlement represents a significant benefit to the estate and is the right thing to do, particularly, since Barclays had every reason to expect that this value would be part of its agreement with the New York Fed.

I was particularly impressed the declarations submitted in support of this motion of Shari D. Leventhal and her remarks made amplifying on the language of that declaration during the course of this morning's hearing. Without going into specifics, in effect, what the New York Fed is saying, this was what the parties contemplated when Barclays stepped into the shoes of the New York Fed at a time when this case was going through its most difficult early days.

Based upon the declarations that have been supported

-- that have been submitted in support of the proposed settlement agreement and the various statements that have been made by interested counsel, I approve the settlement. I'm prepared to enter the order in the form that it has been modified to take into account some of the concerns of Royal Bank whose objection has been withdrawn. And I incorporate into that order by reference the statements that have been made on the record indicating that this is without prejudice to further investigation by the creditors' committee.

MR. KOBAK: Thank you, Your Honor.

THE COURT: Thank you.

MS. GRANFIELD: Your Honor, could I approach with a hard copy of that revised order and a diskette with the order on it?

THE COURT: That will be fine.

MS. GRANFIELD: Thank you.

THE COURT: Thank you.

(Pause)

THE COURT: We seem to be --

MR. OSTROW: Your Honor, may I be excused from the remainder of the hearing?

THE COURT: We seem to be clearing the courtroom. So let's take a moment to do that. And this may be a reasonable time to take a break anyway. Let me just ask people to stop for a moment while I'm commenting. We're going to clear the

courtroom but there's just a statement I wanted to make. I would like to have the chambers conference, if that's what it's going to be, now in reference to the representations as to value. So if anybody is leaving who's needed for that, you can certainly appear with your coats on but let's use this time to go into the conference room across from my chambers' entrance which is right outside in the hall. And during the course of that chambers conference, I would like to also have an administrative discussion with counsel for the debtor about a matter that involves a possible emergency hearing that has been requested by a litigant that does not appear on today's agenda. So let's meet across the hall in five minutes and let's plan on a total break of fifteen minutes.

MR. MILLER: Thank you, Your Honor.

THE COURT: We're adjourned.

(Recess from 11:25 a.m. until 11:58 a.m.)

THE COURT: Be seated, please.

MS. FIFE: Good morning, Your Honor, if it still is morning.

THE COURT: Just barely morning.

MS. FIFE: Yeah, that's right. Lori Fife from Weil Gotshal & Manges on behalf of the debtors. The first thing on the calendar for the LBHI case is an uncontested matter, the debtors' motion authorizing entry into a settlement agreement with certain of its French affiliates. The motion seeks

approval of the settlement and also seeks authority for LBHI to vote in its capacity as shareholder of BLB, which is one of the French affiliates for the sale of the business to Nomura. And also for the voluntary dissolution of BLB, both of which are predicated upon the approval of this settlement.

There were no responses received. And I can go into the terms of the settlement in more detail if you'd like. Otherwise --

THE COURT: It's probably not necessary. I have looked at it.

MS. FIFE: Okay.

THE COURT: And I think it's fine. I'll approve it.

MS. FIFE: Thank you. The second motion on the calendar is LBHI's motion for authorization to assume administrative services agreement with Aetna. Aetna is our administrator of what is now self-funded medical and health plan. We are in the process of entering into a new agreement with Aetna to have Aetna become the insurer. But we still need the administrative services of Aetna. So we have entered into this amended agreement.

There were no responses received so I'd ask the Court to approve the motion.

THE COURT: That motion is approved.

MS. FIFE: Thank you, Your Honor. The third thing on the calendar is LBHI's motion for authorization to reject the

prescription drug program master agreement with Medco. This is the pharmaceutical plan that LBHI and its subsidiaries had. As I just mentioned, we're entering into a new agreement with Aetna so we no longer need this prescription plan. We'd ask that the motion for rejection be approved.

THE COURT: That is granted.

MS. FIFE: The fourth item on the calendar, Your Honor, is a motion to amend orders authorizing the sale of aircraft. You may recall that earlier you approved the sale of the Gulf Stream G-4 and the Falcon 50. Neither of those transactions were consummated mostly because of the decline in the market for airplanes. In addition, the Falcon 50 had some issues with inspection on the aircraft. We continued to market those two aircrafts and were unsuccessful. However, the original purchasers came back and offered to buy those two planes as long as we were able to consummate the sale prior to December 24th which was the reason we needed to shorten notice for this motion.

We believe that this transaction continues to represent the highest and best price for the aircraft and seek the modification. The purchase price for the G-4 went from 24,892,000 to 23,400,000 which is a reduction of 1,492,000. And the Falcon 50, which was originally sold for 6,200,000 has been reduced to 5,900,000 which is a reduction of 300,000.

There were no responses that were filed and the

creditors' committee has reviewed the transaction and supports it as well. So we'd ask that you approve the amended orders.

THE COURT: I will approve the amended order although when I first saw all the paperwork surrounding these retrades of transactions that have only recently been approved, it all got my attention. And I know that a tremendous amount of work had been invested in the original transactions which were presented by your colleague on two separate hearing occasions. And understand that the market for a pre-owned aircraft appears to be in steep descent and, as a consequent, the business judgment that's being exercised here seems appropriate although it's somewhat painful, I might add, to have to revisit these transactions as recently as a month after approval and that these deals are not simply being closed by responsible purchasers as agreed. But I fully recognize that liquidated damages are what they are and that business is what it is.

And so, I approve these with some regret.

MS. FIFE: We have regret as well, Your Honor, but this is the highest and best offer we have.

THE COURT: Understood. And if it weren't the highest and best offer for these assets, I wouldn't be approving it.

MS. FIFE: Thank you, Your Honor. The next matter on the calendar is a contested matter, a motion of OMX Timber Finance Investments LLC. And I'll let --

MR. MILLER: Your Honor, just before -- I think we resolved the other matter --

MS. FIFE: Oh.

THE COURT: Wonderful.

MR. MILLER: -- without the necessity for a hearing.

THE COURT: So there's no need to schedule an emergency.

MR. MILLER: Correct, Your Honor.

THE COURT: Fine.

MR. MILLER: Your Honor, may I be excused?

THE COURT: You may. Have a good holiday, Mr. Miller.

MR. MILLER: Happy holidays to you, Your Honor.

MR. FLECK: Good afternoon, Your Honor. Evan Fleck of Milbank Tweed Hadley & McCloy on behalf of the official committee of unsecured creditors. As Ms. Fife mentioned, this is the motion of OMX Timber Finance for limited relief from the stay. The committee filed an objection on Friday evening and the debtors filed a joinder yesterday.

The parties have met this morning and I'm pleased to report that there is a resolution of the motion. The parties intend to submit an order to the Court for entry later on this afternoon. By way of preview, if I may, Your Honor, just mention the contours of the agreement that's been reached.

The parties have agreed for limited relief from the

stay solely for the purpose of OMX to submit demand notices with respect to the guaranty. That would apply to OMX and also with respect to the indenture trustee for one of the underlying notes on a going forward basis. All parties would reserve all rights with respect to those notices including to argue that the automatic stay applies and that cause does not exist to lift the automatic stay with respect to those notices.

THE COURT: Let me make sure I understand what you've just said. Are you saying that notices will be given as requested in the motion but that the giving of the notice is without prejudice to the argument that it violates the automatic stay?

MR. FLECK: Yes, Your Honor. That is the agreement of the parties in order to allow the parties to continue to discuss the matter and return to the court at a later date, if appropriate, in connection with either a hearing on a motion or in connection with claims reconciliation process. That is the agreement of the parties if it's satisfactory to the Court.

THE COURT: I'll simply say that it's a pretty unusual agreement.

MR. DEVENO: Your Honor, Mark Deveno of Bingham McCutchen on behalf of Wells Fargo. Your Honor, Wells Fargo is the indenture trustee on certain notes issued by OMX and in that capacity receives a pledge of the guaranty. I'll ask Mr. Fleck to confirm my understanding but just to clarify it, I

think, slightly, I don't believe there will be a reservation of whether there has been a violation of the automatic stay for purpose of sanctions or otherwise but I believe the committee's objection was based on a premise that a claim does not currently exist because a demand has to be given. During the claims process, all rights of the parties will be reserved for the committee to argue that that demand, although we've permitted it today, should not have been given in which case at least for a claims resolution process, we'll treat it as though the demand, in fact, hadn't been given and the parties' rights with respect to the various claims that OMX or the indenture trustee might assert would be based on that outcome.

THE COURT: I'm completely befuddled by this. And it's probably -- it's not because of anything you've said. But you can reach any agreement you wish that resolves this. That's fine. I'm all in favor of consensual resolution. But the motion practice that has been teed up for today calls for a very difficult decision to be made absent such an agreement. And that difficult decision effectively deals with the balance of harms standard in the Sonnax case. And you should know, both sides, that I've spent some considerable time in preparation for today's hearing thinking about this very issue. I don't know when it is that you came up with the structure that you're now describing. And I'm glad that you did if it satisfies this dispute at least for today. But in terms of

courtesy to the bench, if this is something that was known earlier than five minutes ago, it would have been very helpful to me to have known it earlier. And I say that because I dedicated very significant amounts of time to this particular dispute over the weekend. In doing so, I might add, I was looking forward to hearing whatever arguments were going to be made today because I consider this to be an extremely close question. Furthermore, it is still not clear to me whether or not a claim currently exists on the part of OMX Timber Finance Investments II, LLC or whether or not that claim is only triggered upon the giving of the notice which, ordinarily, would be barred by the automatic stay. The stipulation you describe is one that so finesses the issue that it seems to me that it creates more trouble than it solves.

And so while I am almost always anxious to approve stipulations, unless I'm misunderstanding something, all you have done is kick the can down the road. You've done nothing about fixing the problem.

MR. DEVENO: Again, Mark Deveno on behalf of the indenture trustee, Your Honor. And we certainly -- I can't stress enough -- appreciate the Court's time and energy put into the issue. And it is, in fact, an issue that has been resolved this morning. So we certainly apologize for the inconvenience to the Court.

THE COURT: No, no. No. I'm not looking for an

apology. I'm looking for a better understanding as to the stipulation that has been reached. Is this a matter which has been resolved to the point that the stay relief before the Court is now moot? Or is this something which simply defers consideration to another date under a different guise by virtue of reserved rights? And I don't understand, and it's probably just because I'm hearing this for the first time, how you can reserve rights with respect to the giving of notice by stipulation which is being so ordered? Because if it's being given in a so ordered stipulation, it would appear that stay relief has been, in fact, given for purposes of giving that notice. And if there are rights which are triggered by virtue of that, I don't know how those rights are effectively reserved.

So I think you need to do -- all of you need to do a better job explaining what this consists of as a matter of law because I'm not getting it.

MR. DEVENO: Excuse me, Your Honor.

(Pause)

MR. DEVENO: Apologize, Your Honor.

THE COURT: We're going to defer this matter. This is not going to continue. We're going to go to the next matter on the agenda. The parties to this stipulation can spend some time in the hall or conference room conferring so that I can have better clarity on the answer to the question just posed.

MR. DEVENO: Thank you, Your Honor.

THE COURT: Thank you.

MS. MARCUS: Good afternoon, Your Honor. Jacqueline Marcus, Weil Gotshal & Manges on behalf of LBHI and LCPI. Your Honor, number 6 on the agenda is the continued hearing with respect to the debtors' motion for assumption or rejection of open trades. When we were last here on December 16th, we postponed eight objections representing eighteen parties to today's hearing. As we knew it would, today's hearing came upon us very quickly. Nevertheless, I'm pleased to report that we have reached and signed agreements with ten parties. And for Your Honor's benefit, I'll name them. They are Bank of America Securities, BDF Limited, Millenium Management, DK Acquisition, Longacre Capital Partners and Longacre Master Fund, Morgan Stanley Senior Funding, Inc., the Royal Bank of Scotland, UFAA, the Bank of Nova Scotia and BlackRock Financial Management.

With respect to the yet unresolved objections that were on the calendar for today, all of the parties have agreed to adjourn those matters to January 14th. So those are AIB International, Putnam, Tennenbaum, Deutsche Bank, Field Point, Bank of America, N.A., Morgan Stanley International Limited and P. Schoenfeld Asset Management.

In addition to the agreements, Your Honor, and the adjournments, there are a few corrections and clarifications to

the December 16th order that we had been requested to make. And we have consulted with the parties that have made those requests and they are all in agreement with the proposed terms. But for Your Honor's benefit, I'll just run through them.

First, there were a series of trades with funds affiliated with Hartford Insurance that were inadvertently included on Exhibit A to the December 16th order. Those trades were actually supposed to be part of the second trades motion which will also be heard on January 14th. The debtors and the counterparties have agreed to treat those trades as if they had not been assumed on December 16th and as if they had been listed on Exhibit A to the second trades motion. Accordingly, any objection to the assumption of such trades will be filed by January 9th in accordance with the second trades motion.

Second, there was an assumed trade with Avenue Investments which was included on Exhibit A to the December 16th order. Subsequent to the hearing last week, Avenue Investments contacted us and told us that they had not received notice of the debtors' intent with respect to this trade until December 14th. Cognizant of Your Honor's ruling at the last hearing, we agreed to deem the Avenue trade deleted from the December 16th order and to provide Avenue with a period of time to object to the assumption of the trade. The debtors and Avenue have agreed that Avenue will have until January 2 to file an objection and that the matter will be heard on January

14th as well.

The third one, Your Honor, is with respect to the objection of P. Schoenfeld Asset Management. While that's one that's expected to be heard on January 14th, there was a trade with P. Schoenfeld where there was a dispute as to who the correct counterparty is. The debtors believe that the correct counterparty was an affiliate of Credit Suisse and P. Schoenfeld believes that they are the true party in interest. So, although that was included on Exhibit A, the debtors and P. Schoenfeld have agreed to give P. Schoenfeld the opportunity to argue that they are indeed the correct party in interest. And the proposed order would deal with that as well.

THE COURT: Does that happen on the 14th?

MS. MARCUS: Yes.

THE COURT: The 14th is shaping up to be a pretty long day.

MS. MARCUS: Hopefully, we'll get a number of them out of the way before the 14th. But we're not sure yet.

THE COURT: I agree. Hopefully.

MS. MARCUS: Finally, Your Honor, in the December 16th order, although we indicated on the record that the R3 objection would be heard on January 14th, when we submitted the proposed order, we inadvertently failed to include R3 on the list for January 14th. So the proposed order that we're submitting later this afternoon will also make that correction.

In addition, R3 has a similar situation to P. Schoenfeld in which there is a trade that we believe is with Credit Suisse but R3 believes they are the correct counterparty. So the proposed order also gives relief to R3 with respect to that. And we have agreed just this morning on proposed language with R3.

I think that covers all the issues. And we'd like to submit a proposed order later this afternoon.

THE COURT: That's fine. Let me ask one question unrelated to the comments you've just made but it does relate to the hearing on January 14th. Last week, Mr. Brozman, on behalf of various clients that he represented, made a number of arguments. I don't know if he's present today and I'm not inviting him up unless he feels the need to speak. But he did raise the question as to whether the hearing on the 14th would be an evidentiary hearing in connection with the matters that concerned him and his clients. Has any progress been made, and the answer could be no, in working out the parameters of the hearing as it relates at least to his clients? And also, as it relates to the others that you've mentioned, are we talking about evidentiary hearings or argument?

MS. MARCUS: Mr. Brozman's clients were on the other motion, the derivatives motion.

THE COURT: Yes.

MS. MARCUS: So I can't --

THE COURT: Oh, am I on the wrong -- oh, the open trades --

MS. MARCUS: That's the derivatives motion.

THE COURT: I'm in the wrong one? I apologize completely.

MS. MARCUS: That's okay. But --

THE COURT: I confused you, too.

MS. MARCUS: But with respect to -- no, you didn't confuse me. With respect to the parties that are objecting here, there is -- Mr. Friedman -- I don't know if he's here. But there's one party that has served the debtors with a discovery request. But in light of the fact that we've now settled, I think, nine of the eleven objections and hope to settle the remaining two, I think the expectation is that if we proceed to litigate with one or both of those clients that the 14th probably would not be an evidentiary hearing because they will not have gotten their discovery by then.

THE COURT: Okay. There's someone standing up.

MS. MARCUS: There he is.

THE COURT: I should have kept my mouth shut. I obviously opened a can of worms.

MS. MARCUS: Hopefully not.

MR. FRIEDMAN: Good morning, Your Honor. Michael Friedman on behalf of P. Schoenfeld and a number of other clients that some of which have settled today and a number of

which have been adjourned to the 14th.

Your Honor, I believe that the response deadline for the discovery that we have served is actually on the 14th as of now. I think that we would work with the debtors to continue the discovery process. We're also working to try to resolve these matters. So I believe that it would be difficult to go forward on an evidentiary basis on the 14th given where we are with our discovery requests. So there may be some preliminary argument or perhaps we would set another date for an evidentiary hearing.

THE COURT: All right. I'm going to assume then that the hearing on the open trades matter will not be an evidentiary hearing on the 14th at least as it relates to your clients. And I'm hopeful that we can avoid an evidentiary hearing as to any of the others as well. But if there is going to be a need for an evidentiary hearing, I just need reasonable notice in advance for purposes of allocating appropriate time and resources.

MR. FRIEDMAN: Your Honor, I would propose that we decide over the next several days whether we're far close enough that we'll settle or whether we're far enough that we think that we will need an evidentiary hearing and then maybe we'd set a schedule for that.

THE COURT: That's fine. Thank you.

MS. MARCUS: Thank you, Your Honor. We'll submit an

order this afternoon.

THE COURT: That's fine.

MS. MARCUS: May I be excused?

THE COURT: Yes.

MS. MARCUS: Thank you.

MS. FIFE: Pretty soon I'm going to be the only one left.

THE COURT: They're bailing on you.

MS. FIFE: Let me just suggest the question that you asked about the derivatives motion, Your Honor. We do anticipate that there will be some evidence needed for the hearing unless we're able to resolve all of the derivative objections. So we will coordinate with your clerk and --

THE COURT: And is that in connection with only certain parties who have objected? Or is there a sense that the entire matter to the extent that there are open issues will involve the need for evidence presented by the debtor?

MS. FIFE: I believe that most of the general issues are legal issues so probably will not require evidence. But there may be evidence required with respect to individual derivative contracts.

THE COURT: Okay.

MS. FIFE: So the next item on the agenda is the consideration of the debtors' motion to sell their interest in the investment -- Lehman Brothers investment management

division to NBSH Acquisition LLC.

As I'm sure Your Honor will recall, on October 16th, the Court conducted a hearing to consider the bidding procedures for the sale of the IMD division. At that hearing, we heard testimony of Barry Ridings, the cochairman of the restructuring group at Lazard Freres, who stated that the IMD division was a valuable but highly sensitive collection of assets whose value is greatly dependent upon its ability to assure its clients and customers of its financial and operational integrity. And he further stated that Lehman's current instability affected IMD's ability to maintain its clients, customers and employees where it would face material disruption of value.

We also heard about the debtors' pre-petition marketing efforts and post-petition marketing efforts and negotiations with Bain and Hellman & Friedman which led to the execution of a stalking horse purchase agreement.

At the conclusion of the hearing on October 16th, the Court approved the bidding procedures and had found that they were reasonable and appropriate and represented the best method for maximizing the value of the assets being sold. In accordance with those bidding procedures, the debtors conducted an auction on December 3rd and, after consultation with the creditors' committee, selected the bid submitted by NBSH Acquisition LLC. NBSH Acquisition LLC, Your Honor, is an

acquisition vehicle formed by and controlled by certain members of senior management of the IMD division.

A copy of the purchase agreement dated December 1st and an amendment to such purchase agreement dated December 19th were filed with the Court. I'll just briefly describe the terms of the new agreement. The key assets being transferred are the Neuberger Berman business, the fixed income business, parts of the hedge fund of funds and single manager businesses, the private funds investment group of the private equity business and certain assets related to the Asian and European asset management businesses.

The liabilities that are being assumed by NBSH Acquisition or its subsidiaries including substantially all of the liabilities incurred on or prior to the closing and also liabilities under contracts assigned to the company or any subsidiaries. They're also assuming some unfunded commitments of LBHI and its affiliates in certain partnerships.

The consideration for the transaction is as follows. LBHI, on behalf of the sellers, will receive ninety-three percent of the preferred units and forty-nine percent of the common units. Management will receive seven percent of the preferred units and fifty-one percent of the common units. Management's consideration vests over time and requires a management to be employed in order to receive that consideration.

The preferred units have an aggregate liquidation preference of 875 million dollars. And subject to approval today, the transaction is expected to close the first quarter of 2009.

The agreement includes customary termination rights which really boil down to closing of the transaction has to occur prior to June 30th, 2009 and the sale order needs to be entered prior to January 31st, 2009. There's no other party consents or client consents required.

The board of the new company following this consummation will consist of seven managers, two managers appointed by LBHI, four managers appointed by management, two of which must be independent, and George Walker, the current global head of investment management for Lehman Brothers. If dividends aren't paid on the preferred, then the preferred holders have the right to nominate additional directors.

The structure of this transaction is intended to permit the distribution of the preferred units and the common units that LBHI and its subsidiaries receive to creditors of LBHI and creditors of the subsidiaries pursuant to a plan of reorganization. So, during the Chapter 11 case, LBHI and its subsidiaries will hold the preferred stock and common units and then will ultimately distribute it out to its creditors.

Your Honor, in the courtroom today is Mr. Ridings. With the Court's permission, I would offer to proffer his

testimony regarding the debtors' participation in the diligence and auction process and also why the debtors determined that this bid was the best and highest bid.

THE COURT: Is there any objection to the offer of a proffer of Mr. Ridings' direct testimony? There's no objection so you can proceed by means of a proffer.

MS. FIFE: Thank you, Your Honor. Mr. Ridings' educational and professional background and Lazard's involvement in the sale process are also set forth in the record on October 16th so I'm not going to repeat them here.

If Mr. Ridings was called to testify in support of this sale motion, his direct testimony would be as follows: Mr. Ridings would testify that after the bid procedures were approved, Lazard began a comprehensive marketing process. Lazard contacted eighty parties consisting of forty-three potential strategic and thirty-seven potential financial buyers. Thirty-nine of the potential buyers requested an initial diligence package which included an NDA bid procedures letter, bid procedures order and a copy of the stalking horse purchase agreement. Ten parties signed NDAs and were given access to a data room and also the ability to meet with management. Several groups had diligence meetings with management. Fifteen Lazard professionals were involved in this process including nine managing directors who assisted in soliciting potential buyers. Mr. Ridings would testify,

however, that a total of three qualified bids were received in accordance with the bid procedures order: the stalking horse bid, the bid NBSH Acquisition LLC and a bid by Crossmark Investment Company L.P.

Mr. Ridings worked very closely with Alvarez and Marsal and with the professionals of the creditors' committee to review the bids. He would testify that Lazard assessed a deteriorating value of the stalking horse due to the declines in the S&P 500 and related purchase price adjustments and the uncertainties surrounding the stalking horse obligation to close a transaction given various significant closing conditions.

Mr. Ridings would also testify that Lazard spent significant time and resources negotiating the terms of the management bid on behalf of the estate. Lazard participated in a series of meetings and calls in the weeks leading up to the December 3rd auction including over the Thanksgiving holiday. Lazard held discussions with the management team and with portfolio managers. Mr. Ridings would testify that the debtors' estate and management team negotiated at arm's length and in good faith. The management team was represented by separate counsel.

The purchase agreement represents the result of a competitive purchasing process and extensive negotiation. Mr. Ridings would testify that the cross-market bid was only for

the private equity funds managed by Lehman Brothers Private Equity Fund Management LP. The consideration for the bid was sixty million dollars in cash and 105 million in assumed contingent liabilities. He would testify that neither the stalking horse nor the management team would agree to separate out these assets from their bid. Mr. Ridings would testify that Crossmark proposed an alternative bid at the auction. After several hours of discussion, however, that bid was deemed not competitive by virtue of being extremely difficult to structurally implement. And also Mr. Ridings would testify that the value of the stalking horse bid and the management bid were higher and better than the Crossmark bid.

Mr. Ridings would testify that the debtors estimated the stalking horse bid to be worth approximately 745 million dollars to the estate. This assumed that the stalking horse actually closed the transaction. The purchase by its adjustments to that offer were primarily, as I said, the S&P adjustment and also an adjustment that lowered the price of the bid in proportion to the run rate revenue which had declined given the market conditions.

Additionally, the stalking horse had the ability to withdraw its bid under a number of circumstances. Mr. Ridings would testify that at the auction the estate determined the management there to be worth at least 922 million dollars to the estate and, therefore, at least 176 million higher than the

stalking horse bid. Accordingly, the management bid was determined to be the starting bid even after taking account of the breakup fee and expense reimbursement that would have to be paid by the estate in the event we took another bid.

The valuation that Lazard did was determined by utilizing current projected normalized EBITDA of 152 million dollars assuming operational restructuring and a normalized 8.6 times multiple. The estate receives 814 million dollars face value preferred equity plus forty-nine percent of the implied common equity value equal to 212 million dollars less the breakup fee of fifty-two million dollars and expense reimbursement of thirteen million. Plus, the management bid provides the estate with the upside in the form of the retained forty-nine percent equity interest. The stalking horse bid would have meant selling the entire IMD business at valuations which were extremely low given the market conditions.

At the auction date alone, the value of the S&P had fallen twenty-nine percent since the stalking horse bid was signed, and forty-six percent off the peak in October 2008. Current value of the S&P 500 is the lowest it's been since the dot.com bubble in 2002.

An index of comparable investment management companies were looked at by Lazard and compared the trading values. Current trading values are at their lowest level in the last ten years. This compares to the last twelve month

average valuation of 8.6 times a five year average valuation of 11.2 times, and a ten-year average valuation of 10.5.

Additionally, since 2002, comparable investment management companies have been sold at an average purchase price of 13.6 last twelve months EBITDA in change of control transactions. So it was determined that the stalking horse bid was at the lowest possible, and management bid was higher.

During the auction the stalking horse, Bain and Hellman & Friedman were given the opportunity of overbid. We met with them and they determined that not to provide an additional bid, Your Honor.

Mr. Ridings would also testify that the management bid was also deemed to be better in qualitative terms, including the certainty of price and consummation in the market of an unprecedented volatility. There's no downward purchase price adjustment in the management bid, and there are only customary closing conditions. There are no walk away rights in the management deal versus walk away rights in the stalking horse bid.

And, importantly, the management bid does not require additional bankruptcy filings, whereas the stalking horse bid would have required LBHI to have filed numerous subsidiaries. Such filings would have further unnerved the client base and led to significant withdrawals as well as portfolio manager defections.

Based on the advice provided by Lazard and after consultation with the creditors' committee, the debtors determined in their business judgment to accept the bid of NBSH Acquisition and to move forward to consummate the transaction subject to the Court's approval.

This would be the conclusion of Mr. Ridings' testimony.

THE COURT: Does anyone wish to examine Mr. Ridings in connection with the offer of proof just completed by counsel? Evidently not, I accept the proffer.

MS. FIFE: Thank you, Your Honor. Your Honor, the debtors filed a revised proposed order to reflect the terms of the new agreement and a selection of NBSH LLC as the successful bidder. We have copies available for parties that have not seen them. Since the filing of the proposed order we have received certain comments and suggestions for corrections, and we've made those as well. And we have a further blackline reflecting those changes.

There were seven limited objections filed and one objection to the proposed sale. As I said, we had discussions with other parties, including Barclays and the creditors' committee, and have resolved those.

As noted in the reply filed by the debtors, none of the objections dispute the proposed sale in the reasonable exercise of the debtors' business judgment, or that it's in the

best interest of the debtors and their creditors to consummate the sale. However, four of the eight objections relate to executory contracts and unexpired leases. And the time for assuming and rejecting those contracts and leases. The objections point out that the debtors do not provide counterparties to those contracts with notice of assumption and cure amounts. A proposed order that we filed, however, does take this into account and provides that the debtors will file with the Court and provide notice of assumption, assignment and cure amounts to counterparties, to all purchase contracts, transfer the real property leases or sublease real property leases. And that counterparties will have fifteen days notice and an opportunity to object to the proposed assumption and the cure amounts before the debtors assume and assign any of those contracts.

The debtors believe that with this revision we should resolve the objections filed by SunGard Creditors, Oracle USA, Thomson Reuters PLC and 605 Third Avenue PLLC, although my understanding is that attorneys for some of these parties are here and would like to be heard, Your Honor.

THE COURT: Well, we'll find out what they think about whether or not what you just said satisfies them.

MS. FIFE: Right. I also just want to point out for one of the parties, in particular, but it applies to everyone, that the rights of all contract counterparties to reject to the

assumability or assignability of their contracts with the debtors is also reserved such that if a party believes that its contract cannot be assigned, that they can make that argument after we have provided them with notice.

The objections filed by Benjamin Gamaron, Crossmark and 220 News Owners LLC I have grouped because, in essence, these creditors are creditors of nondebtor subsidiary that -- as to which the Court really has no jurisdiction. As we discussed on October 16th, this sale includes the sale of property of the estate and also the property of nondebtor subsidiaries. These parties have claims against nondebtor subsidiaries. Benjamin Gamaron has brought a lawsuit. Crossmark has a claim against some of the funds for an earn-out. And 220 News Owner has a guaranty from Neuberger Berman Holdings LLC, also a nondebtor.

As creditors of nondebtors they really have no standing here and have no rights to object to the sale. However, if the entities as to which these parties have claims are sold in a stock sale, then the parties will continue to have a claim against the purchaser. If those entities, as to which they have a claim, are sold in asset sales, then those parties will have claims against the proceeds of this sale. And what we intend to do, Your Honor, is higher an independent party to allocate the proceeds in each of the debtors or companies or their subsidiaries that are being sold, so that we

will properly identify the amount of the value that was sold to the buyer. And we will distribute the consideration in accordance with that valuation and allocation. And the agreement also provides that while the allocation will be of the preferred stock and the common stock, LBHI will have the right to replace that with cash, so as to satisfy any claims of creditors, if necessary. So we believe that that deals with those objections.

Finally, the PBGC objected to the proposed sale on two grounds. The first is that we asked the Court to waive the ten-day stay. We have modified the order to put in the ten-day stay because the reality is that this transaction will not close for several months as we're seeking consents of the customers. PBGC also objected to the extent that the debtor sought to transfer nondebtor control group members to NBSH LLC free and clear of their joint and several ERISA liabilities arising out of Title 4 of ERISA. We have had discussions with the PBGC and as a result we have revised the order to make it clear that we are not transferring nondebtor control group members free and clear of their joint and several ERISA liabilities. Nothing in the proposed order is intended to prejudice the PBGC rights with respect to control group members or as a general unsecured creditor against LBHI's estate. They're permitted to share in the proceeds of any sale to the extent they have a valid claim.

With the changes made to the proposed order and the representations that I have just made, I believe that the PBGC's objection has been resolved.

And, Your Honor, I have a blackline order that demonstrates those revisions, which I hope resolves the PBGC's, if I can it up to you.

THE COURT: That's fine, you may approach. Thank you.

MS. FIFE: With that, Your Honor, the debtors believe that entry of the sale order at this time is appropriate and in the best interest of the debtors, the creditors and all parties-in-interest. Unless Your Honor has any other questions, I would ask that the objections be denied and the sale approved.

THE COURT: I'm prepared to hear from counsel for the various objectors who either confirm that their objections have been taken care of by the various adjustments that you've made to the order, or the comments that you've made on the record. Or will continue to press their objections to the extent that they're not satisfied.

I do have one question, which is just for my own curiosity. During the hearing that took place on October 16th, we spent quite a lot of time discussing the procedures applicable to the transfer of customer's accounts. To what extent, if at all, did the procedures that had been adopted by

the stalking horse impact the decision of the debtor, through Mr. Ridings and otherwise, to choose as between the competing bids. And to what extent does NBSH Acquisition get a benefit of any sort as a result of the continuity of operations associated with -- in effect having the very same investment managers continuing to do what they do under, what I assume, will be the same trade dress for the most part, but simply with a different equity split?

MS. FIFE: Well, first of all, Your Honor, as I briefly mentioned, the Bain and Hellman & Friedman bid required that we put many, many entities into Chapter 11, which we viewed as extremely detrimental. We had hoped that following the hearing, we could provide sufficient information to Bain and Hellman & Friedman to get them comfortable so that a Chapter 11 case, with respect to a lot of the subsidiaries, would be unnecessary, but we were unsuccessful in doing that. They insisted that we file quite a number of subsidiaries which we believed would have resulted in a drastic loss of value, very, very significant.

With respect to the actual consent process, we are required to go through the same consent process. However, Bain and Hellman had -- because Bain and Hellman had insisted on filing these other Chapter 11 cases, it would have been necessary for us to put in the letters that we sent to each of the customers and in the proxy statement and the letters that

went out to the shareholders the possibility or probability that their entities may end up in Chapter 11. And that, in and of itself, management viewed as extremely detrimental to their client base and to the ongoing viability of the company. So we thought that there would be a significant deterioration in value. With management continuing, the letters that we're writing to our clients and to the stockholders of the mutual funds are much better phrased and termed and will give the customers comfort that the managers, whom they had invested money with, are continuing. And, in particular, the portfolio managers themselves are now part of the equity team. And I think that gives -- we believe that it gives a lot of comfort to the customers and will help maintain the client base.

THE COURT: Am I correct in concluding from your comments, that at least as of this moment, customers have not been solicited for their consents on behalf of the stalking horse bidder, so there is no conflict in the solicitation process?

MS. FIFE: That's correct, Your Honor. We really ran into some issues over the disclosure that would be necessary. And we've determined that we could not -- we actually couldn't get it out prior to the auction. So there is not going to be any conflicting.

THE COURT: So the issue that occupied so much of our time and attention on October 16th turned out to be moot?

MS. FIFE: That's correct, Your Honor.

THE COURT: Okay. Let's hear from the parties who are either satisfied or dissatisfied with the consequences of your adjustments.

MR. DOSHI: Good afternoon, Your Honor. Amish Doshi with the firm of Day Pitney on behalf of Oracle USA Inc. I think for the most part, the additional representations by counsel satisfy Oracle. However, there are two points that I wanted to just clarify. With respect to the first, that any executory contracts or unexpired leases, notwithstanding anything either in the order or the unit purchase agreement, are subject to the notice procedures outlined in paragraph 12, I believe, of the order because there's language in different parts of the order that might be deemed contradictory to paragraph 11. So if we can have that representation that notwithstanding anything in the order or the unit purchase agreement, any assumption and assignment of executory contracts or unexpired leases with -- I only care about Oracle, but with respect to any counterparties, will be subject to the notice provisions outlined in Paragraph 11.

And, secondly, that the same applies to -- there was a bid notice that was filed on December 9th identified NBSH as the successful bidder. And in that bid agreement, there were certain references to the transfer of intellectual property rights. So I just want clarification that similarly any

intellectual property rights that where Oracle is a counterparty are not being transferred and are subject to the same notice provisions with an opportunity for Oracle to file any additional pleadings upon receiving notice and all of its rights are reserved with respect to those items as well.

THE COURT: I think it's probably best to just comment one at a time. Is that a satisfactory arrangement from the debtor's perspective, because it was a lot more specific than what heard during your presentation?

MS. FIFE: That's correct, Your Honor. What we propose to do is give parties to contracts with a debtor fifteen days notice prior to the assumption and assignment of that contract. But to the extent that we are seeking to transfer contracts and leases of nondebtors that are not subject to the jurisdiction of this bankruptcy court, we will comply with whatever the requirements are in that particular contract or lease. I don't see what else we can do.

THE COURT: Okay. I don't want to convert this into a negotiating session in open court over the form of the order, but there is a legal issue that has just been articulated that applies across a number of objections. And so, rather than make Oracle the one party who's in the middle of this one, why don't we just move on, Oracle can make further comments with respect to what was just stated at the end. But I have a strong strength that issues as it relates to the nondebtor

counterparty part will be presented across the board here, to the extent that there are affected parties.

MR. DOSHI: Thank you.

MR. KENT: Good afternoon, Your Honor. Tom Kent from Paul Hastings on behalf of 605 Third Avenue. Our client is a landlord with a lease to the nondebtor. And I understand by the representations made by counsel here there is no intention to put this nondebtor into bankruptcy. So we're here simply as a nondebtor and as creditor to the nondebtor. And our concern, Your Honor, is --

THE COURT: Ordinarily, that would be enough for me to say you're excused.

MR. KENT: But, Your Honor, I have tremendous concerns that the form of the order that is being proposed to be entered is inappropriate and potentially is binding on my client. And I'm here simply to raise my point.

Your Honor, on Friday afternoon, the debtor submitted some changes to the form of the agreement. And that agreement -- and those changes have been set forth in our papers that we filed a day later on Sunday afternoon, basically sets forth the possibility that the debtor, could, in fact, exclude assets or exclude liabilities of nondebtors. And as set forth in our papers, Your Honor, what we can find as a landlord is that our asset is excluded from the shares of this nondebtor that potentially is being sold. That's certainly

listed on the scheduled of shares of nondebtors that are to be sold. But notwithstanding that the shares are going to be sold, I believe that the changes that the debtor proposed on Friday would allow assets of these nondebtors to be excluded from the sale. So we may end up somewhere, I don't know where we would end up, what entity we would end up, but stripped away from the assets of the nondebtor that are there now.

THE COURT: Who's your client's tenant here?

MR. KENT: I'm sorry?

THE COURT: Who's the tenant?

MR. KENT: Neuberger Berman LLC, which is a second tier Neuberger Berman entity.

THE COURT: And there's no dispute that Neuberger Berman LLC is a nondebtor?

MR. KENT: That's correct.

THE COURT: And there's no dispute that Neuberger Berman LLC is not on account of this transaction, at least, likely to become a debtor any time soon.

MR. KENT: Well, that's the representation that counsel made this morning.

THE COURT: What then is before me to decide as a bankruptcy judge as it relates to your objection? Your counterparty is a nondebtor; you represent a nondebtor. Ordinarily, somebody in your position would be talking in state court not in federal court.

MR. KENT: That's correct, Your Honor. However, the definition of assets that's included in the sale include the assets of nondebtors. There are potential transactions that Your Honor is being asked to approve as part of this transaction that affects nondebtors.

THE COURT: Bankruptcy affects all kinds of nondebtors all the time, that's not unusual. I might add that the papers that you filed on Sunday, which I read, were untimely. No special permission was asked to file papers on a Sunday afternoon. There's no provision for filing papers of the sort that you filed, within hours of a commencement of a 10 a.m. hearing on Monday. And, frankly, I don't understand why you did it.

MR. KENT: Your Honor, this was solely in response to the amendment that was filed by the debtor Friday evening after 6:00.

THE COURT: You didn't think it would be sufficient for you to be able to stand up and make whatever arguments you're now making, but instead to do something that's not authorized by the rules or the case management order?

MR. KENT: Your Honor, we tried to reply as quickly as we could to --

THE COURT: There's no question that you replied quickly. You replied in a manner that was prejudicial to me. I ended up having to read a tremendous amount of material over

the weekend. I thought whether or not I should read yours or delete it from my computer. I read it. But I don't think it's good practice.

MR. KENT: Your Honor, I apologize if the papers were improper.

THE COURT: No. What I'm saying this is in part to you and in part it relates to orderly case management. This is a very large and important case, and there are a lot of people who are interested in it. But that doesn't mean that everybody has the license to file papers willy-nilly. You did and you shouldn't in the future.

MR. KENT: Accepted, Your Honor.

THE COURT: Now, let's get to the merits. Just because there may be some consequences as between a nondebtor and a nondebtor to the approval of a transaction doesn't to me amount to an objection that cognizable as a matter of bankruptcy law. In what respect do I have jurisdiction to even deal with what you're complaining about?

MR. KENT: Your Honor, the issue is whether in fact -- first of all, we don't know whether this is going to occur or not, or whether there will be any transactions affecting my client or not, these are all potentially set forth in the amendment that was filed by the debtor Friday evening. However, the form of the order that Your Honor's being asked to enter has findings with respect to whether this was a

fraudulent conveyance, whether fair consideration was being received, whether parties have had an opportunity to review the transaction, all of which, Your Honor, I don't think should be binding on any potential subsequent action that my client may have in state court, any rights that my client may currently have that potentially they may raise in state court, and that there should be nothing in this order that should be binding upon parties that are really not before you.

THE COURT: Well, it's kind of definitional, isn't it? If you represent a nondebtor and your counterparty tenant is a nondebtor, a bankruptcy court order should not be, at least directly affecting anything that involves that relationship. There may be indirect consequences of all sorts that arise out of bankruptcy court orders that affect nondebtors and other, but there's not much I can do about that. And I don't know what you're asking for other than a clarification from the debtor that there's no intention in the order that affects the relief being sought today that directly impacts a transaction between your client, a nondebtor, and your tenant, a nondebtor.

MR. KENT: Your Honor, what I'm asking for is a specific provision in this order that there's nothing in this order that would be binding upon my client if, in fact, there are any claims that my client may have against the nondebtor's assets that are being sold pursuant to this transaction. That

to the extent that this -- in terms of Neuberger Berman LLC is a fraudulent transfer, that if certain assets of Neuberger Berman LLC are being transferred as part of this sale, if that's a fraudulent conveyance, my client should have the right to allege and bring those causes of action. There should be nothing in the order.

THE COURT: Your client has whatever rights your client has. And you're not going to get anything from me to either improve or clarify those rights. If you're able to get such language or understandings from debtors' counsel, you're certainly free to have that conversation. This is not a bankruptcy issue as far as I'm concerned. You've already confirmed multiple times in this colloquy that you represent a nondebtor and that your counterparty is a nondebtor. And you really don't belong here.

I refuse to grant your client any relief based upon the papers you've submitted or the argument you just made. If you wish to get clarification from the debtor you're free to do that.

MR. KENT: Thanks, Your Honor.

MS. MAZER-MARINO: Good afternoon, Your Honor. Jill Mazer-Marino, Mayer Suozzi English & Klein for the SunGard creditors. I'm happy to report that our objection is resolved by the debtors' representation on the record that the rights of SunGard with respect to its contract, that is all of its rights

and claims with respect to its contracts, are reserved. And we would have the opportunity to assert those rights and claims through the end of the fifteen-day window period. And I thank debtor for their cooperation.

THE COURT: Fine, thank you.

MR. SCHWARTZ: Your Honor, good afternoon. James Schwartz, Stempel Bennett Claman Hochberg for SLG 220 News Owner LLC.

My position is very similar to that of Mr. Kent's. The only reason -- I am a nondebtor guarantor of my client's lease. The only concern that we had was that the order that Your Honor was going to enter here could somehow prejudice our state law rights, whatever they may be. But I think you've clarified that already and I'm not going to press the point any further.

THE COURT: Fine.

MR. SCHWARTZ: Thank you.

MR. LOBELLO: Good afternoon, Your Honor. Edward LoBello, Blank Rome for Thompson Reuters.

Your Honor, we have filed a limited objection and reservation of rights. I'd like to confirm for the record what Weil Gotshal indicated, that based upon the proposed order that's before you and the debtor's representations in its omnibus reply, and also before the Court, that our papers are simply a reservation of rights to reserve our rights

accordingly and before our limited objected.

THE COURT: Fine, thank you.

MR. HERMAN: Good afternoon, Your Honor. Ira Herman from Thompson & Knight for the Crossmark entities.

Your Honor, we've had colloquy with the Weil Gotshal attorneys and representative of the debtors. I've been authorized to stand down at this time as a result of discussions.

THE COURT: Fine.

MR. SHERIDAN: Good afternoon, Tom Sheridan from Hanley Conroy on behalf of Benjamin Gamoran.

And as my colleagues -- based on the representations that have been made and the rulings that Your Honor indicated on the record, we withdraw that objection.

THE COURT: Thank you. Is there anyone else who wishes to be heard on this point?

MS. THOMAS: Good afternoon, Your Honor. Stephanie Thomas on behalf of the Pension Benefit Guaranty Corporation. Based on the changes to the sale order the representations in the omnibus objection and made here today, we also withdraw our objection to the sale order.

THE COURT: Thank you. Now let me ask Oracle if Oracle wishes to say anything more, or if you're now satisfied.

MR. KENT: I'm satisfied with --

THE COURT: You may not be, I don't know.

MR. KENT: I'm satisfied with respect to the contracts with the debtor and the notice and the reservation of rights. However, I'm a little troubled by the statement made with respect to nondebtor entities and any contracts that the debtors herein are seeking to assume and assign contracts that nondebtors may have with Oracle.

THE COURT: That can't happen.

MR. KENT: And that's exactly the point. If that's the representation, then I think we're fine. Thank you.

THE COURT: It's just a basic principle of bankruptcy law. I can't do it.

MR. KENT: Thank you.

MS. FIFE: Just very quickly, Your Honor, about the same thing. We're not seeking to assume and assign any contracts with nondebtors because it's not appropriate and you don't have jurisdiction over that.

If we choose to assign a contract, as I said before, we'll comply with whatever requirements are in that particular contract. And right now we have no present intention to file any other companies. So I just want you to understand that.

THE COURT: Okay.

MS. FIFE: Thank you.

THE COURT: Is there anything more?

Based upon the record that has been presented, the argument of counsel, the withdrawal of various objections or

the overruling of objections, I am satisfied that the debtor has demonstrated cause for approval of the sale of its investment management division, which is being sold to NBSH Acquisition, the highest bidder at a duly noticed auction which was conducted in accordance with the Court approved bidding procedures. The transaction, as represented, represents the highest and best value for the assets that are being sold, and represents what appears to the Court to be a creative means to preserve the potential for the debtor to realize higher value in the future at a time when market conditions may be materially more favorable than they are today.

Under the circumstances I'm prepared to enter the order in the form that it has been submitted, with a proviso that to the extent that there are parties that have expressed concerns, reservations and objections with regard to the form of the order, that they at least be afforded an opportunity to review the order as it has been revised. And to the extent there are some language adjustments that may make the order a more comforting document than it is today, and are not objectionable to the debtor, that the debtor at least give some consideration to those comments. With that, the transaction's approved.

MS. FIFE: Thank you, Your Honor. And we will provide copies of the order to everybody.

And, in addition, Your Honor, we have orders and

disks for the uncontested matters, which we'll take care of shortly. One of them needs to get entered today, if possible.

THE COURT: We'll try to enter all the orders today.

MS. FIFE: Thank you, Your Honor. I appreciate it.

THE COURT: Now, in terms of the agenda, we had one deferred matter, OMX.

MR. FLECK: Your Honor, Evan Fleck of Milbank Tweed on behalf of the committee. Unfortunately, in light of the other matters the Court has been dealing with, we hadn't all had an opportunity to discuss whether a consensual resolution is appropriate even among the parties. We would request, if the Court pleases, to have a brief recess so that we can all confer.

THE COURT: Here's my suggestion. It's now after 1 p.m. and this is an omnibus day, not an omnibus morning, so we can certainly return at 2:30, which would give everybody hopefully time to get some lunch and to perhaps also confer. This is a matter which is somewhat parochial in that it involves particular parties. And so unless there are people who are very interested in knowing the outcome, no one else needs to come back, but all are welcome.

So we're adjourned until 2:30.

(Recess from 1:08 p.m. until 3:01 p.m.)

THE COURT: Please be seated. First of all, let me apologize for the delay, I was dealing with an emergency that

was unexpected. What's going on?

MR. JURELLER: Good afternoon, Your Honor. John Jureller from Klestadt & Winters on behalf of OMX Timber Finance Investment II LLC, I'll just refer to as OMX Timber, if you don't mind.

I do apologize early on for the confusion, parties did think up they came up with a good resolution --

THE COURT: It may be, I just don't understand it.

MR. JURELLER: I think at this point, after discussing it further, that we're just going to proceed forward with the motion.

THE COURT: Okay. So the result of what I said is that instead of having a settlement you have a bloodbath.

MR. JURELLER: Well, we'll see if that's the case or not. I think, basically, again, we've reached the agreement five minutes before you got back on the bench the second time, so that's why there was no prior notice to you about the proposed stipulation. But we had an understanding that was merely a claims issue whether or not this was deemed a valid claim or not a valid claim, and that's why we were going to push it off until the claims process. But I think after discussing it we're willing to go forward at this time and argue the relief from stay motion.

THE COURT: Well, I think it's uncharacteristic for the Court to be in the spot of unsettling something that's

already been settled. Is everybody comfortable that the right procedure for this aspect of the case right now is to have it head now? Because I'm certainly prepared to hear it.

MR. FLECK: Your Honor, Evan Fleck of Milbank on behalf of the committee.

We are, Your Honor, prepared to go forward. We also thought that a settlement, albeit a temporary settlement, was acceptable to -- as Your Honor said, it did push the can down the road a little bit. But we've also said we were comfortable going forward, I think the debtors are comfortable going forward at this point. And it's OMX's motion. And I think based upon the relief that they seek, it's appropriate and we're certainly comfortable doing that on behalf of the committee.

THE COURT: Fine, let's go forward then.

MR. JURELLER: As I said, Your Honor, John Jureller from Klestadt & Winters on behalf of OMX Timber. Also present is Mark Deveno, who represents Wells Fargo, who is the indentured trustee. This note was securitized.

I could go through the details, the facts, if you'd like, but they were set forth in the papers. Essentially, this is a motion for relief from the automatic stay under 362(d) for the limited purpose of issuing a demand notice to Lehman Brothers Holdings pursuant to the terms of the guarantee. This motion does not seek to deem the claim allowed, this motion

does not seek to compel payment. Basically, the motion is to reserve rights of OMX Timer under the guarantee and pursuant to its terms.

THE COURT: Let me ask you a question.

MR. JURELLER: Sure.

THE COURT: As a matter of law, if hypothetically, I don't grant your motion, do you have a claim?

MR. JURELLER: I believe that we do, Your Honor. And as part of the presentation I was going to set forth that. But if the Court were to look to In re Texaco, which was cited by the committee as joined by the debtor, as well as the other case that was cited, essentially what the Court stated, and I'll actually read it, because I think it's very instructive here, and really kind of shows the precautionary nature of this motion. We believe that we need to make this motion in order to comply with the terms. However, at the end of the day if the relief is not granted, I believe that the claim is still in place.

In Texaco, what they stated was "the debtor should not be permitted to use the automatic stay and argue that a formal notice of acceleration is a condition proceeded to the noteholder's right to claim the higher interest rate."

Essentially in that case, what they said was that you couldn't not lift the automatic stay but then hold the claimant to that in not being able to assert the claim themselves. So

that's what we sort of see as this case here. And I think it's actually dead-on with the In re Texaco matter.

As I go forward I'll differentiate those two cases. But I think actually the cases cited by the committee actually support the motion rather than go against the motion.

Essentially, Your Honor, it's admitted that submission cause exists for this limited modification of the automatic stay. Of all the Sonnax factors I believe the balancing of the harm factor is really the only one that applies here.

THE COURT: That's the one I'm most concerned with.

MR. JURELLER: Sure. Under the terms of the contract, OMX Timber must serve a demand notice within sixty days of the interest payment default, which is the trigger event for this particular motion. There was an interest payment default on October 29, 2008 which was post-petition. Arguably, in order to comply with the terms OMX Timber will have to serve this demand notice by December 27th of this year in order to comply with its terms. Again, taking into consideration the fact that the relief is not granted we believe we still have a claim.

It's our position that there's no harm to the debtors in this case because we're not seeking to compel payment, we're not seeking to deem the claim allowed, that process will happen down the road. Basically, all we're trying to do is preserve

the rights that were contracted for in the both, the installment note and the guarantee itself.

The committee as joined by the debtor essentially attempts to cloud the issues here. Generally speaking, they have I think four arguments that are set forth in the papers. The first argument is the demand notice creates an obligation in and of itself, and without it there is no claim. However, the obligation is a pre-petition obligation that became ripe as a result of the default, not of the debtor, not as a result of the bankruptcy of the debtor, but as a result of the default of the counterparty under the installment note. This is essentially a timing issue. The parties contracted to basically a statute of limitations within their installment note and within their guarantee.

The second argument that's set forth by the committee is the argument that the automatic stay was not contemplated by the guarantee. And I think they really spent a lot of time on that saying that these are sophisticated parties, that they should have contemplated this bankruptcy and automatic stay. And, therefore, because the bankruptcy was filed, the guarantee is automatically terminated. Now, I don't think that basically has any basis in law or in fact. In fact, what I think the debtor is attempting to do and what the committee is attempting to do here is to use the automatic stay as a sword rather than a shield. And essentially --

THE COURT: I think you can make that characterization if you like. But I think what I'm reading into their papers is that sophisticated parties are able to rather easily avoid the problem by not providing for a notice period and in sophisticated business transactions bankruptcy planning is a natural part of what business lawyers think about and pay attention to. And since bankruptcy planning appears not to have been part of the thinking in connection with this transaction, you should, in affect, be stuck with the consequences. That's my reading of what they've said.

MR. JURELLER: Well, on the opposite side of that, if they were sophisticated parties and bankruptcy was contemplated, then they could have easily put into the agreement that upon the filing of a bankruptcy of the guarantor, the guarantee is being terminated. And that wasn't in the agreement either.

THE COURT: Do you happen to have any knowledge or information as you stand here as to the reason for the various notice periods that were set forth here and why notice wasn't waived, and what the purpose notice was to serve in the transaction?

MR. JURELLER: I do not, Your Honor. Maybe Mr. Deveno on behalf of the trust could shed some light on that.

THE COURT: If he can, that's fine. I'm just interested in knowing why this transaction was structured so

awkwardly.

MR. JURELLER: I really don't know, to tell you the truth. I mean, it was a transaction that was put together five years ago. Whether or not anybody ever thought that Lehman Brothers would ever file bankruptcy or Wachovia, which is another of the guarantors, would ever file bankruptcy, it probably never crossed their mind, to tell you the truth. But I'm just speculating, I do not know the actual reason for that. And I will defer counsel, if he does know, although I'm not sure that he does.

The third argument that the committee has set forth is that a balancing of the harms actually weighs in favor of the debtor. And the sole reason that they set forth for that argument is that allowing this claim to go forward will increase the claims pool. However, in and of itself, increasing the claims pool should not be deemed a reason or a factor for not allowing this claim to go forward or allowing this contractual right to be provided for.

And, lastly, the debtor has cited what it deems the regular case law, which is two cases. In re Texaco which we've just discussed, and In re Metro Square. In both cases, the claimants were attempting to better the position solely based upon the bankruptcy filing of the debtor. And that's not the case here. In fact, OMX Timber is not seeking to better its position at all, it's seeking merely to reserve its substantive

right that it contracted for in its guarantee and in the installment note. In re Texaco, just to go into not all the details, but just very briefly, sought to accelerate the note to avoid a reduction of the interest rate. Post-petition the interest rate was going to be reduced from thirteen percent down to seven percent. The Court had previously permitted a modification of the stay to allow the noteholders to serve a notice of default upon the debtor to preserve their rights. What the Court did not do, though, was to give them that next step to try to better their position and allow for the higher interest rate. However, what the Court did say is that they could file the claim for the higher interest rate and that would be a claims objection issue.

In re Metro Square the claimant sought to accelerate, to assert a claim against the nondebtor guarantors. The Court allowed the claimants to file a claim in the full amount. Just not to use the ipso facto clause to accelerate the debtor to go after the guarantors. And what the emphasis of that decision was, actually, was that the Court found that the guarantors were vital to the bankruptcy itself because they were the principals of the debtor and that they were going to be providing funding for the reorganization of the debtor. That was really the basis behind the decision, it had nothing to do with the notice -- whether or not the notice -- the stay could be lifted before the notice.

As I said, OMX is not seeking to better its position, it's merely seeking to maintain its substantive rights that it contracted for.

THE COURT: Let me ask you this.

MR. JURELLER: Sure.

THE COURT: Since I think everyone recognizes that what we're most focused on for purposes of stay relief is the balance of harms. What harm does OMX suffer if this motion is denied, since you earlier stated that this is not a critical element in your ability to press your claim?

MR. JURELLER: Well, I think that the harm, Your Honor, is that this is a contractual provision for filing the demand notice within sixty days. And the harm is that down the road, although we believe the case law supports the filing of the proof of claim, whether or not the stay is lifted, that it could raise questions as to the proof of claim that will be filed. And this is one instance where a demand notice needs to be served, this is the interest payment default. There will be other defaults that will be coming in down the road. There's an interest and principal payment default, which is based upon the other defaults. There are other defaults that could happen within six months, as interest payments are paid every six months. So the harm to OMX Timber is that this could create an issue down the road that they were not permitted to follow the contract obligation and could raise a question as to a claim

which, obviously, is very substantial, 817,500,000 dollar claim, not including accrued interest at this point. So that's the harm at this point.

On the other side, the harm to the debtor, we don't see a harm to the debtor, to tell you the truth. It's going to be a claim against the estate. We're not fighting over the claim right now, we're not deeming it allowed, we're not asking for payment. It's going to be a claim in the regular course of the claims process, just as other people had filed a claim against the estate. This is just a contractual obligation that we need to meet in order to get there, to not have questions down the road.

THE COURT: Well, it seems to me that you're arguing about harm which is, in affect, equal on both sides of the scale, because either giving your argument it due, your client suffers the harm of being exposed to a defense to the claim or the debtor suffers the harm of losing a defense to the claim. As you say, isn't it in affect the same issue being put on a scale equally? Because you're talking about not your right to payment which you assert continues regardless of the outcome, you're talking about posturing for purposes of claims litigation at some future date in the case.

MR. JURELLER: Our argument is that notwithstanding the motion today, that the OMX Timber will have the right to file its proof of claim. And that this is a precautionary

motion. There's more of a harm to OMX Timber if it is deemed -- because down the road there could be a question as to whether or not they met a contractual obligation, which the debtor does not have. The debtors' only argument at this point is whether the claim is for the amount that it's being filed as.

THE COURT: Okay. The position you're now advancing is somewhat different from the position which was set forth in your papers, I think.

MR. JURELLER: In which way, Your Honor?

THE COURT: Paragraph 12 argues "cause exists to lift the automatic stay because it is necessary for OMX Timber to preserve its right to collect under the guarantee. In order to hold" -- I skipped a sentence. "In order to hold LBHI liable on the guarantee OMX Timber II must issue a demand notice by December 27, 2008." Is it your position, and I don't mean to put you in a position where you're arguing something against something you may have to argue later if I were to deny the rely you seek, but in terms of the balance of the harm equation, is it your position that you may be unable to assert your claim at all if this relief is not granted?

MR. JURELLER: That's not our position. Our position is a precautionary motion. Our position based upon the case law is that we feel comfortable with the argument that we'll be able to file the claim notwithstanding the decision on the

motion.

THE COURT: You'll be filing the claim knowing that it will almost immediately fetch a claim objection that there was a failure on your part to fulfill conditions precedent.

MR. JURELLER: Again, I think this is more --

THE COURT: Is that right?

MR. JURELLER: I'm not backtracking on what I'm saying. I'm saying this is the motion why we want to file it, why we want to serve the demand notice, because we want to meet those contractual obligations. But if we were to, again, not be successful on the motion, we believe we may still have rights. But, again, the word is may still have rights to file the claim. But certainly there will be arguments out there by the committee or by the debtor that they -- that the claim was not filed properly because we did not meet the contractual obligations, notwithstanding, the In re Texaco case law.

So its almost a two-partner. We want to file the notice to meet our contractual obligations, so we avoid that issue down the road. Because if we do that, there's not going to be an issue as to whether we met our contractual obligations. However, if the list stay is not granted, we'll be filing our proof of claim. Now we will be subject to a fight because there may be a question down the road as to whether or not we had the ability to file a proof of claim, notwithstanding the fact that we didn't serve the demand

notice. So I think it's a two-part --

THE COURT: What is the purpose served by the filing of the demand notice? Transactionally why is it a necessary prerequisite.

MR. JURELLER: I'm going to let Mr. Deveno address that a little bit, but there's other people that are -- other parties that are involved with respect to this transaction. My understanding of it, and not being privy to the drafting of the whole agreement but reading it, is that OMX Timber needs to file its demand notice within sixty days of the interest rate default. Then there's a next step where if Lehman Brothers does not make payment, I believe then OMX can now go back after the principal, which is Boise II, we refer to it is. But in order to get that next step there has to be a proper demand made on Lehman Brothers. So it's almost like a tiered-type demand that has to be done here. That's my understanding of it. And I'll let Mr. Deveno speak a little bit to that.

THE COURT: Okay. I'll wait to hear more then.

MR. JURELLER: Thank you, Your Honor.

THE COURT: Thank you. Why don't I hear more from that side of the table, unless you have comments for the committee now.

MR. FLECK: If I may, Your Honor, on behalf of the committee -- Mr. Deveno, I'm not sure if he's going to be speaking as a witness here, he's counsel to the bond trustee,

not the movant here.

THE COURT: I understand. I think he's simply standing up to answer a question that --

MR. FLECK: Very well.

THE COURT: -- was pending moments ago. You're not here to argue but to tell me more about why notice is a required feature of this transaction.

MR. DEVENO: Correct. Good afternoon, Your Honor. Just for the record, Mark Deveno, Bingham McCutchen on behalf of Wells Fargo as indentured trustee. In our case, I suppose, we are not a movant or actually a joinder in the motion. But I think in part because as Mr. Jureller indicated, I think we generally view the motion as protective or somewhat surprised by the objection. I can walk the Court through a little bit of our thought process on that. But let me start with -- you always asked a couple of questions of Mr. Jureller related to whether the claim existed without the notice, and related to the intent of the notice and demand provisions.

Is there a particular place you'd like me to start, Your Honor, perhaps at one of those questions before --

THE COURT: My focus on this if you know is what purpose is served by the notice provision within the structure of this transaction? My most naive question is why would anybody put such a provision in a transaction like this? And if it was being put into the transaction, why wasn't there some

provision made for what happens in the event that one important party happens to be in bankruptcy. Because even if the Lehman bankruptcy was not contemplated it certainly was the kid of risk that parties do think about in situations like this.

MR. DEVENO: Sure. It's a fair question. And I have to confess, Your Honor, I can't speak from personal knowledge of the issue, I can only speak from a review of the documents having become indentured trustee counsel in the last -- I'm not sure how long it is, let's say few months. But there -- I think something that may not have come out in the presentation and the materials filed with the Court is the complexity of the overall scope of the transaction, and the fact that there are any number of parties, call it four or five different types of constituents that are all -- you know, have moving parts with sales of assets running one way, installment notes running another, a Lehman credit support to one party and a guarantee to another. And it's a fairly complex transaction, Your Honor. I think the relevant concept of notice and demand relate to the fact that there are so many parties involved in this complex structure. And just as a for instance, and it even goes to the point of harm, Your Honor, and harm to OMX, is the relevant installment note that's attached to the motion is the installment note provided by Boise Land to OMX guaranteed by Lehman, that's what the guarantee relates to. That installment note actually has a provision that it cannot be accelerated

absent the -- you know, absent making demand on the guarantee. And I think the parties came up with a complex arrangement that reflected the order in which things should happen. I suspect that's part of the reason for the demand and the notice-type structure. And it is a guess on my part based on the documents. But it does go to harm, Your Honor, in the sense that we have a third party out there, a nondebtor unrelated to Lehman whose rights -- you know, OMX is somewhat prejudiced against if they have to sit on their hands during the bankruptcy case and not provide the relevant demand.

THE COURT: Sorry, how are they prejudiced?

MR. DEVENO: In the sense that they are prevented under the relevant terms of the contract, the installment note that was attached to the motion, has a provision that provides that OMX cannot pursue its rights to accelerate against Boise Land and pursue its rights against Boise Land, this nondebtor, until it's made the demand on Lehman. It's a complex transaction.

THE COURT: Okay. I hear you. But isn't that just another example of a complex transaction in which the parties failed to contemplate this eventuality?

MR. DEVENO: Actually, I don't know that that's the case, Your Honor.

THE COURT: Was it contemplated?

MR. DEVENO: I think in a manner of speaking it is.

One of the interesting things here -- and if I can approach, I actually have a copy of the perspectus that went with the indenture which --

THE COURT: I don't really want to see that now.

MR. DEVENO: And which happens to be underwritten by Lehman and talk about what happens in the even of a Lehman bankruptcy.

THE COURT: I'd be happy to take it, I'm not going to look at it while you're arguing, I'll just hear what you have to say.

MR. DEVENO: Sure. It's a very short bit of language I was hoping to read to the Court, if there's no objection.

THE COURT: Is this a surprise to the Lehman camp?

MR. FLECK: Yes, Your Honor, we don't have a copy of this document.

THE COURT: I'm not going to look at it if they don't have a copy.

MR. DEVENO: Okay. I suspect then, Your Honor, you don't want me to read language into the record at this moment as to --

THE COURT: No. I'm interested in knowing whether or not bankruptcy was, in fact, a contemplated aspect of the structuring of the transaction. That was a question, and if you can answer that it's fine.

MR. DEVENO: Sure. Sure. Then rather than handing

it up, let me just give it a little color. Again, remembering this is a complex transaction, various components, including the indenture, as part of the transaction, the indenture was underwritten by Lehman. And one particular provision of the prospectus relates to the insolvency or financial distress of -- I should pause for a moment just to highlight that there's really two different sets of OMX transactions. One that involved Wachovia, one that involved Lehman. They're two separate transactions structured the same, so if you hear me read Wachovia, that's the explanation for it.

The section was titled "the insolvency or financial distress of Wachovia or Lehman Brothers could reduce the likelihood of repayment of the applicable offered notes." And if I go on to read it it says "the only practical remedy available to the indentured trustee upon a default under an installment note is a demand for payment on the applicable guarantee. The insolvency of Lehman Brothers or any of its subsidiaries or certain financial distress with respect to Lehman Brothers or any of its subsidiaries, could limit Lehman Brothers' ability to perform under the term of the Leman Brothers guarantee. Such inability to pay under the Lehman Brothers guarantee would reduce the likelihood of repayment of the Class A2 installment note. And consequently reduce the likelihood of repayment under the Class A2 notes."

I think all focused on inability to pay, not a

concept that the guarantee, itself, somehow became ineffective at the time that a bankruptcy was filed. And nowhere in that prospectus to my knowledge, Your Honor, is some indication that Lehman Brothers' view was that the guarantee would be coming affective.

THE COURT: It seems to me that it's a risk factor that wasn't fully flushed out.

MR. DEVENO: Well, if I could. You know, one thing that struck me interesting watching the argument -- and, again, we didn't join the motion because I think we view this as somewhat perfunctory in the sense that --

THE COURT: It's not. Let me assure you this is not perfunctory.

MR. DEVENO: I understand, Your Honor. But part of the rationale on that was if the stay motion is I guess denied today, I suspect what OMX will do is not necessarily file it's full proof of claim, I suspect that may shape up over time. I think if I were in OMX's position I would probably file a proof of claim which attaches the relevant guarantee demand form. I might later amend it when I have another guarantee demand or otherwise. But if I look at the technical read of the document, the provision that the -- of the guarantee, I'm sorry. The provision that the committee focuses, Your Honor, or focuses on, Your Honor, is one sentence that really basically requires that the guarantee demand be made within a

certain time. And they try to argue that this means that, you know, with sophisticated parties, aware of automatic stays, they must have known that you couldn't give a demand during a bankruptcy so the guarantee must have been ineffective during a bankruptcy. I think I contend, Your Honor, that all that OMX needs to do is file a proof of claim attaching that guarantee demand. And the argue would run as follows: The only technical requirement of the document is that the guarantee demand be delivered, just to their point that there's no -- that these are sophisticated parties. There's no provision of the guarantee that says the guarantee becomes ineffective, it only requires that the guarantee demand be delivered. And I think it would be delivered by the proof of claim. I suspect that proof of claim would later be amended for the next demand, etcetera. I think that OMX could meet its obligations pretty easily. And perhaps that's what the parties considered when they structured this.

THE COURT: Well, if that's true then there's no harm.

MR. DEVENO: Well --

THE COURT: If you're right there's no harm.

MR. DEVENO: Yeah. I mean, I think that's a fair interpretation. The harm, of course, is the fact that the objection was brought. And the fact that we're apparently facing an argument that that proof of claim, or otherwise,

might be ineffective to serve this demand notice. And I think that's probably why OMX has brought this kind of protective pleading, just to make sure that they don't get tripped up on a technicality.

THE COURT: Okay. Well, the underlying theme that concerns me, and either you can comment on or others can, is whether this is the motion that you describe as perfunctory and I tell you is not, or whether or not this is an effort to cure a structural defect in the underlying documents, or whether or not this is a means to elevate the position of OMX as claimant? I can't tell yet, based upon the arguments that have been made and the papers that I have reviewed. Whether the filing of this notice is an express condition precedent to the right to payment or whether it is a mere ministerial act. And I'm not asking you to respond to that, I'm just telling you and the others in the room, that's a question I still have.

MR. DEVENO: Okay. Again, I think it's -- I suppose I will respond, I have the podium for a moment longer. I think in our view, Your Honor, that it is a mere ministerial act in the fact that, again, if you focus on the relevant language being focused solely on a timing issue, a timing of when demand is made, and the fact that that demand could presumably be included within a proof of claim, yes, one could argue that means no harm, just file the proof of claim. But I think it's also evidence that this could be viewed as just a ministerial

act, so what harm is caused to anybody by permitting the relief from stay to more formally serve the demand.

THE COURT: Let me assume something with you for a moment.

MR. DEVENO: Sure.

THE COURT: Assume for a moment that Lehman Brothers is not in bankruptcy and you're not before a bankruptcy judge. Assume that there is a failure due to oversight or neglect in giving the notice that you're now seeking to give before December 27th. Under applicable non-bankruptcy law, does the failure to provide that notice affect the ability of parties who are in a position to pursue a Lehman guarantee to do so?

MR. DEVENO: I suspect contractually the answer is yes, Your Honor.

THE COURT: So then it's not a mere ministerial act. It goes to the substantive rights of the parties.

MR. DEVENO: Well, does it go to the substantive rights of the parties that they have a claim, they need to preserve their claim by providing the demand.

THE COURT: Is it a condition precedent to the claim, or is it a preservation of a right to a claim?

MR. DEVENO: I would argue it's a preservation of the existing claim.

THE COURT: Why? What do you mean by claim preservation, does that involve moth balls, how do you do that?

MR. DEVENO: Well, certainly, Your Honor --

THE COURT: I truly don't understand the term, what do you mean by -- what do you mean by claim preservation?

MR. DEVENO: Certainly, Your Honor, Lehman signed the applicable guarantee. And at all times absent to bankruptcy, anyway, as the debtors argue, intended to performance upon receiving a demand. I don't think that fact has changed. And that demand, as I say, can be provided through a proof of claim, it can be provided through this automatic stay request. And I think that would -- I suppose maybe that results in the same thing as a contingent claim, Your Honor, I struggle to sort of articulate it in the terms you've asked, but certainly there's an existing guarantee. It seems to be a ministerial act given that it could just be included with a proof of claim, the relevant demand, and it would protect that claim.

THE COURT: Okay, thank you.

MR. DEVENO: Thank you, Your Honor. Obviously, reserving, Your Honor, to respond after everyone has had a chance to speak.

MR. FLECK: Good afternoon, Your Honor. For the record, once again, Evan Fleck of Milbank Tweed on behalf of the committee.

Your Honor, it doesn't surprise the committee that the OMX trustee believes that this is a ministerial act, the serving a notice of demand with respect to the guarantee. In

fact, we understand from debtor's counsel that the OMX trustee has, in fact, served the demand on the debtors in connection with its documents. And that's a separate issue and that's the reason why I rose to speak before Mr. Deveno spoke, and that will be taken up separately, Your Honor. But we do recognize that the trustee believes that this is a ministerial act. The committee was pleased, actually, that OMX recognizes that relief from this Court is required in order to serve a demand with respect to the guarantee.

THE COURT: Let me just stop you for one second. Are you saying that a demand has already been served?

MR. FLECK: Yes, Your Honor. We understand --

THE COURT: When did that happen, what does it consist of, is it a stay violation, and does it moot the current motion?

MR. FLECK: Your Honor, we don't believe it moots the current motion. We learned about it this morning from the debtors. The debtors' counsel received a copy of the demand notice from the OMX trustee in connection with their documents. I understand that there's a pledge of the underlying note in connection with financing -- the OMX, indentured trustees' financing. They have certain rights, apparently with a similar structure to make a demand. And they've sent a demand notice to the debtors. I don't believe a copy of it is in the courtroom today. And as I said, Your Honor, we recognize that

it hasn't been brought before the Court, although it is relevant, we believe, to the issue that's before us because it deals with the same structure of making a demand against the debtors which we think is a real request for relief from the automatic stay that certainly is not limited. It's not a limited relief from the stay, it's asking, actually, for quite a significant subsequent relief from this Court, which we believe is to create a one -- an approximately one billion dollar claim against the estates. That's the reason -- I'm not sure if that addresses Your Honor's question with respect to that.

THE COURT: Well, you've addressed it certainly in part. I was trying to understand whether or not that notice, which has already been delivered is, in fact, the same notice that would be delivered if this motion for stay relief were granted. Is it a different notice or the same notice?

MR. DEVENO: I can speak to that.

THE COURT: Let me just find out the answer to that question and we'll go back to the committee after that.

MR. DEVENO: Again, Mark Deveno for the record, Your Honor. And forgive me, I should have covered this fact as opposed to having it presented in this way. A demand notice has been -- in theory has been provided by the indentured trustee. It is -- forgive me for using the word in theory, I'll come back to explaining it. It's in theory that the

relevant demand here, what happens under the documents is the indentured trustee receives a pledge of the guarantee and the installment note. It receives certain rights to enforce those obligations. Again, the first of the various potential demands was provided, although it was provided with a remarkably cautious cover letter of -- and I'm pointing out that we've attached the relevant guarantee demand form, but making abundantly clear that there is no actual immediate demand or otherwise being made. And, again, we'll reserve for another time as to the impact of that. But I think that the cover letter may in and of itself -- I hate to suggest this on the record, but I think the cover letter in and of itself may raise some question as to whether it was a proper and formal service of the demands since that it's important to us, as indentured trustee, to see OMX be able to deliver as its requested.

THE COURT: I'm confused. Is the demand that is the subject of the pending motion the same demand that was cautiously delivered to the debtor or is it a different demand?

MR. DEVENO: It's the same -- it's the same first demand. What OMX has to do is deliver two demands. A demand in respect of a missed interest payment, followed by a demand in respect of misprinciple and interest. The demand that has been delivered is a demand in respect of the missed interest payment.

THE COURT: And is that not the same demand which is

the subject of the pending motion?

MR. DEVENO: It is a demand that's subject of the pending motion, Your Honor.

THE COURT: So when the trustee, however cautiously, delivered this demand, what was counsel and what was the trustee thinking in terms of the relationship between the pending motion and the action that either didn't require stay relief or may expose the trustee to a claim for a stay violation?

MR. DEVENO: Obviously, Your Honor, we'll reserve on that and the issues will play out. But I will say that it was our view and our impression of where the current motion was, we were -- frankly, we were somewhat surprised when the Friday objection came in.

THE COURT: So when was the demand delivered?

MR. DEVENO: The demand, I believe, was delivered -- I don't know if I have it at my fingertips, Your Honor, but I believe it was delivered Thursday of last week.

THE COURT: Mr. Jureller seems to want to speak, too. I think we should -- this is for a relatively contained matter. This is already showing signs of kind of disagreeable disorder. So I think we need to have one person speaking at a time.

MR. JURELLER: Your Honor, John Jureller. I was just going to address that question. The demand that was served was a demand that was served by the indentured trustee. The

motion, itself, that was filed was filed by OMX, itself. Two separate entities from my understanding. So, although, they're similar in that the demands are made to the same party under the same note, the demand that we sought under the motion came from or was hopefully to come from OMX, not from the indentured trustee.

THE COURT: Who has standing to bring this matter before me? Is this an indentured trustee issue, is this an OMX issue? And if one has delivered the demand does that moot out the request of the other?

MR. JURELLER: My understanding was that possibly both parties, because it was -- the note was pledge to the indentured trustee as part of the securitization, that both parties possibly had the right to further a demand. The noteholder is still OMX Timber Finance Investment II LLC. However, it's been pledged, so, therefore, the trustee arguably has standing as well to make a demand for a default under the note.

THE COURT: Well, use the term disorderly to describe the argument. But it seems to me that transactionally this is more than disorderly. Ordinarily, one would think that only one party would have the standing to make demands, otherwise there could be conflict. But we don't need to address that right now. I think I've heard enough on that score.

MR. FLECK: Your Honor, once again, Evan Fleck.

At least with respect to the demand, that is the subject of OMX's motion, the committee is pleased that OMX, based upon its papers, acknowledges that relief from this Court is required in order for it to serve its demand. And to be clear, Your Honor, the demand -- the guarantee which was attached to the motion states "that it is a demand for payment of all principle outstanding under the installment note, and accrued and unpaid interest payment is due and has not been made by the obligor. And payment of such amount is demanded of the guarantor." That's what the note says, that OMX seeks to send to the debtor. And we agree with OMX that unless this Court finds that there's cause under the Sonnax factors, they cannot transmit that demand to the debtor.

In response to Your Honor's question, whether OMX has a claim absent the ability to transmit the demand, the committee believes that there would be no claim without the relief from this Court, and then ultimately sending the demand notice based upon the language of the guarantee. Which states "guarantor shall have no liability to beneficiary for any guaranteed obligations for which a demand is not delivered to guarantor within the notice period set forth in the guarantee."

As has been commented upon in the argument up to this point, this is and was a tremendously sophisticated transaction. There are several memoranda that were generated internally at Lehman describing the transaction with flow

charts that run from page to page. The parties were advised by counsel who clearly understood -- hopefully understood the transactions they were entering into. And, in fact, did contemplate bankruptcy. Bankruptcy planning is part of these documents. In fact, the guarantee specifically talks about bankruptcy and the effect of bankruptcy. In paragraph 2 at the end it speaks to bankruptcy of the obligor, it doesn't speak to bankruptcy of LBHI. But there's no allegation that the documents are unclear. And so it's fair to read from these documents that the parties either did or should have made certain consideration for bankruptcy but drew the documents up as they decided if it was appropriate for the transaction. And none of us here in the room today were present, I don't think any of us needed to have been present because the documents are unambiguous. But suffice it to say from the Committee's perspective, presumably, this was the benefit -- this was the benefit of the bargain that was struck. And by their motion, OMX is seeking to change that bargain. And is seeking to change the terms. So that a notice is not required in order to breath life into the guarantee.

And, again, looking at the plain language of the guarantee in paragraph 2 it speaks to a number of circumstances where no notice is required. It lays it out quite explicitly in paragraph 2 of the guarantee. But the beginning of that paragraph starts "except as set forth in paragraph 3 below."

And paragraph 3 goes through in painstaking detail what OMX must do and when and to whom in order to serve its demand with respect to the guarantee. And it's repeated five times in the document. And we think that that's not an accident, Your Honor.

Again, sophisticated parties drew up a document that they believed was appropriate for the transaction. And we think that the motion that's before the Court today is, in fact, extraordinary. It's asking this Court to rewrite the document, to write around the automatic stay.

THE COURT: But it's really not doing that, Mr. Fleck. The motion is asking for the right to do what the document expressly provides. It's not asking it to be rewritten, it's asking that the automatic stay be lifted so that what the parties contemplated could take place. I'm not arguing with you, I'm just letting you know that I don't like that argument, particularly.

MR. FLECK: Very well, Your Honor.

With respect to the balancing of the harms, we think that is -- we agree with OMX that that is the relevant Sonnax factor. There's only that possibly could help their argument out of the twelve. And we think that's it. But when OMX's counsel said that when you look at -- really, the balancing is with respect to the claim and they would lose out if they don't get a claim, and then there's a claim against LBHI. And, okay,

it's a large claim, but just merely adding a claim to the claims pool is not harm to the estate. We disagree, we think it is. And it's quite a significant claim.

But, in addition, we are cautious and recognize that we should make an argument about floodgates very carefully and only in appropriate circumstances. But, Your Honor, we do believe in this circumstance there are plenty of disappointed parties who, but for the automatic stay would seek certain remedies from this Court. And by permitting what OMX is seeking from this Court, the committee is quite concerned about other parties coming forward seeking similar relief.

In the context of the balancing of the harms, we think that's quite relevant and certainly weighs against granting the relief under these circumstances. We understand the committee is cognizant of the fact that the result might be painful economically to OMX. We cited some cases in our objection reports. The Second Circuit has recognized that in bankruptcy certainly parties are disappointed by the results economically. And we think that's the result here that's appropriate.

The committee did not pursue this objection lightly but recognized it's in the interest of the unsecured creditors of these estates to allow only those claims that are appropriate. And legally, where there's a legal right to have claimed to be asserted against the estate to proceed. And on

its face, based upon the clear documents, the committee is confident that his claim -- that OMX does not have a claim to assert against these estates as a result of the automatic stay.

And for that reason, Your Honor, we request that the motion be denied. And I'd be happy to respond to any questions from the Court.

THE COURT: It's your position on behalf of the committee that a denial of this motion would mean that OMX is deprived of the ability to pursue its 800 plus million dollar claim against the Lehman estate, is that the direct consequence of your argument?

MR. FLECK: Your Honor, I should be more clear. The specific relief that we're seeking here is that a claim under the guarantee not be pursued because we feel like the automatic stay prevents OMX from pursuing a claim under the guarantee and stay relief is not appropriate because cause does not exist.

If OMX, as it seems that they intend, would like to file a proof of claim in the case and pursue that, there's a process for that and we believe will be dealt with in due course. But we believe -- we think that the guarantee is written so that they lose their right to a claim if they don't take the action that needs to be taken within this period of time.

THE COURT: What's your position if they don't prevail today but they've done everything that they can

possibly do to give notice. In fact, Lehman has noticed. Lehman knows that these parties are asserting rights under this guarantee. They've given notice directly perhaps as a stay violation through the indentured trustee, and they've given, certainly, notice of their intention to give notice through this motion. Is it your position that that does nothing in terms of their ability to perfect their claim, because they've done everything that they can do under the circumstances, including even possibly something that isn't allowed as a matter of law?

MR. FLECK: Well, Your Honor, if OMX was able to make an argument that cause exists to lift the stay then we think that they would have a right to assert a claim under the guarantee. We don't think cause exists and what naturally flows from that is that they do not -- they cannot pursue a claim with respect to the guarantee, with respect to notice.

THE COURT: It sounds like forfeiture to me. It sounds as if they're unable to get the relief that they seek, your position would be they lose all rights. Is that your position?

MR. FLECK: Well, they certainly have the right to pursue a proof of claim. They have a right to file a proof of claim and have that claim adjudicated through a process. We don't think that the -- we think that at its core, the issue is that the document was written in a way that's unfortunate and

shouldn't be rewritten to fix the problem. Obviously, sophisticated parties now and in hindsight, OMX would presumably write a guarantee that doesn't require any action and that if automatically there would be an acceleration, a garden variety guarantee would so provide. So we all know what everyone was trying to do here and they didn't get it done.

There's a significant harm to the estate as a result of curing what certainly was intended to result here. And we don't believe that the Court should cure that problem for OMX. To be sure, yes, the natural result of what flows from that is it may be that OMX is without a claim. When the process runs through its natural course, they file a proof of claim and there's an objection, there's an adjudication of that claim. And as Your Honor recognized, there's a condition precedent to -- perhaps a condition precedent to their right to recovery. And that could be adjudicated at a later time.

But, yes, the simple answer is that it may be that they are without a claim here.

THE COURT: Okay, thank you. Mr. Fail, do you have anything to say?

MR. FAIL: Thank you, Your Honor. Garrett Fail, Weil Gotshal & Manges for the debtors.

The debtors filed a joinder in support of the committee's arguments. And I restate that, again, for the record. I would simply add, not that I think Your Honor has

accepted any of counsel's representations or anything that counsel for movant or someone who's joining movant may have read into the record as evidence. These are facts that were not -- you know, still aren't apparently known to all parties in the courtroom today. And so, certainly, the debtors would reserve all rights to challenge any allegations of facts that were made by movant's counsel.

THE COURT: Okay. Anything more?

MR. WILAMOWSKY: Your Honor, if I may just respond to some of the points that -- for the record, I'm sorry, Steven Wilamowsky, Bingham McCutchen LLP on behalf of the indentured trustee.

I just wanted to be able to respond to a couple of the points of the committee counsel. First thing is that both said it and they said it in their pleadings is that well, if OMX wanted to have the benefit of being able to have its guarantee claim even in a bankruptcy it should have drafted around it. In fact, they used the word draft around in the pleading that says well, I'm sure there are many other disappointed parties that could have -- that are in hindsight sorry that they didn't draft around the automatic stay. Your Honor, you're not supposed to be able to draft around the automatic stay. There are a legion of cases that show -- render unenforceable attempts to end-run the automatic stay. So it's pretty good indication if there is such an easy way to

have end-run the automatic stay in a way that nobody would argue with and that everybody agrees is common. It's probably a good hint that the purposes of the automatic stay are not being offended because otherwise courts wouldn't enforce it, courts don't allow you to end-run the automatic stay.

So, if anything, we think that cuts in favor of the motion because what it demonstrates is that it underscores that no automatic stay policy, no bankruptcy policy is being violated by the request. And the reason why the bankruptcy policy is not being violated by the request is because it is also well settled that the automatic stay is not intended to affect the substantive -- to impair the substantive rights of the nondebtor parties. It's intended to be a breathing spell. It's supposed to freeze everything in its tracks. And it's not supposed to render a party's -- impair a party's substantive claim that they can later assert in the bankruptcy through the process. And where there is a risk that that substantive claim is not going to be preserved for the purposes of having it available to be adjudicated through the claims process, then that we submit is reason why the motion should be granted.

I use an analogy in terms of the prejudice to the debtors in terms of what comes up on a 9006(b) cases all the time, where parties want to come in and file a late claim, and where the debtor asserts that the prejudice is well then there's going to be a claim against me, and if you deny the

motion there won't be a claim. Courts routinely have said no, that's not a prejudice. You've got to show -- you've got to make some kind of argument that's -- you know, sometimes the court will accept a floodgates argument, sometimes the Court will accept an argument based on the settled expectations of the parties, because there's already been a disclosure statement and a plan that's gone out. But the fact that there's going to be a claim that's going to be added to the pot, that's not a cognizable harm in the context of this kind of a process. Because it is not the goal of the Bankruptcy Code to impair parties' substantive claims. The goal of the bankruptcy code is to deal with those claims as they exist under state law. Take the state law claims and then divide the pot equally or in accordance with Bankruptcy Code priorities.

So for that reason, again, Your Honor, we would submit that any prejudice based on the fact that this happens to be a large claim is -- there isn't an even balance as Your Honor suggested. Well, isn't it even because we're going to have a claim and they're going to avoid the claim? No, because if we've got a state law claim then we're entitled to be asserted that claim under the Bankruptcy Code. And if I didn't have the automatic stay somehow we're not going to be able to assert that, then that is a harm that is inuring to the detriment of the parties on this side of the table. But it's not, I would submit, a cognizable harm the other way to the

parties on that table.

Finally, Your Honor, I would just want to -- Your Honor spoke about the question of whether the demand is ministerial or it's a precondition to the right of payment. And I think that everything that I've been arguing here is let's assume that it's a precondition to a right of payment. I think that Your Honor can safely for the purposes of granting the motion -- if Your Honor were inclined to grant the motion, Your Honor can do that even by assuming that it is a precondition to a right of payment.

But that's exactly the point. The point is that it would be a precondition to a right of payment. And by not allowing the OMX to exercise that precondition OMX is being prejudiced. Nobody's arguing that this is literally a brand new claim. They talk about it creating a claim, but if it was creating a claim, literally, then there wouldn't be a stay issue at all. It would be -- nobody's arguing it's a post-petition claim. Obviously, they would have a right to assert a post-petition claim. Everybody's agreeing that his is a pre-petition claim that's arising under pre-petition contract. What the demand does, it ripens the claim, it matures, it becomes payable, something happens to the claim. But it can't be a brand new claim that's being created, the claim has to preexist the bankruptcy, otherwise we could be saying okay, we've got a post-petition claim when nobody's asserting that

we've got a new post-petition claim. So it's a claim that exists. And it's a claim that already exists -- I think that's the point when Your Honor asks what does it mean to preserve a claim? I think that what it means to preserve a claim is if the claim never existed before then that's a brand new claim. But if the claim did exist and we've got to take steps to make sure that it doesn't go away, that's what I would submit is called preserving a claim.

Thank you, Your Honor.

THE COURT: Does the principal obligor continue to exist? The obligor on the note?

MR. WILAMOWSKY: Yes.

THE COURT: And is that obligor and obligor that has a credit strength to make payments under the note?

MR. WILAMOWSKY: I don't think it's structured that way.

MR. JURELLER: It's my understand that it's more of a -- the way that it was structured it was more of a shell type company, but it does not have the capital strength to make payments under the note. It's my understanding but I don't speak for that.

MR. WILAMOWSKY: I think, Your Honor -- I think we have Congress to blame for this whole big mess. Because I think somehow they created the tax advantage status for Timber related access, I guess somebody from the Timber lobby maybe --

THE COURT: So why don't you blame them not Congress.

MR. WILAMOWSKY: So how it ended up is that I think this was a vehicle where -- if, Your Honor, we consider it it's very strange, because essentially in order to go against the primary obligor you've got to show that you've made a demand against the guarantor. I mean, that's highly unusual and I think it's just reflective of the priorities in terms of what was expected out of the transaction, that you'd be able to go to Lehman and assert that claim.

THE COURT: Well, again, assuming that Lehman is not part of this equation, just for purposes of my understanding how this transaction was contemplated initially, was there a ready source of identified cash flow from the borrower in the structure to make the designated payments of principle and interest, under the 2020 loan? Because I understand the original installments were to go out to the year 2020.

MR. DEVENO: Your Honor, Mark Deveno of Bingham.

Oddly enough, the answer is -- oddly enough in the transaction, the answer is yes. In that credit source was itself Lehman, Boise itself has claims against Lehman. Again, blame the Timber lobby.

MR. WILAMOWSKY: Oh, okay. It was a Lehman entity that -- when the whole Lehman enterprise collapsed so, therefore, that naturally created a claim against the guarantee, against LBHI.

THE COURT: Yes. But my question was whether if you assume away for a moment the Lehman guarantee and you were simply looking simplistically at a borrower that presumably had cash flow that matched the obligations at the time that this transaction was set up, is there such a borrower and is it generating cash flow?

MR. WILAMOWSKY: I think the answer is that there is such a borrower, but it's source of cash -- of payment was a different Lehman entity. And, therefore, it doesn't have any source of cash flow.

THE COURT: Okay. So that source is dried up.

MR. WILAMOWSKY: Right.

THE COURT: All right, thank you.

MR. WILAMOWSKY: Thank you, Your Honor.

THE COURT: I'm not going to decide this today. But what I am going to do is to provide that when I do decide it it will relate back to today.

This means that the moving party, OMX, has at least done what it needed to do timely to get stay relief that speaks as of a date prior to the notional deadline of December 27.

The reason I'm not deciding it today is that I don't have enough information yet. I've asked any number of questions and the answers are not anything other than lawyers, and that's fine, telling me to the best of their ability what they think the facts are. But as Mr. Fail has pointed out in

his comments on behalf of the debtor, the debtor reserves all of its rights to the actual facts and what the evidence would show if we had an evidentiary hearing, which today is not.

I think there is a need for an evidentiary hearing in this instance. And there are a number of questions that I have. The first general question is to understand the structure more fully than I do now. Why it was set up the way it was set up, the purposes to be served by the various notice provisions, and a better understanding based upon the underlying transaction documents as to why notice within a certain period of time is deemed to be an important condition to the obligations of Lehman as guarantor.

Everybody recognizes that balancing the harms represents the fundamental question here. And I'm getting mixed messages from the parties as to just what kind of harm that is. I'd like to know more from the moving party OMX, as to the actual harm to be encountered by virtue of a denial of the requested relief. I'm particularly troubled by the fact that the indentured trustee appears to have, at least at some level, mooted the motion by delivering under whatever kind of cover letter was carefully created by counsel, what appears to be a demand notice covering the very same subject matters of the pending motion. Assuming there is efficacy to that demand, and I don't know if there is or there isn't, this is a motion I could easily deny. To the extent that there's no efficacy the

notice may be a nullity, or may be liability creating.

I want to know a lot more than I know right now as to why that notice was sent and what color of law was cited in the cover letter that gave the trustee the authority to send it in the first instance on Thursday.

In terms of the harm to the debtor I think that Mr. Wilamowsky's argument was quite persuasive in suggesting that there is no harm, it's just a claim, one of many. And that the business of bankruptcy is not to erect artificial barriers to keep legitimate claims outside the bankruptcy court.

I'd like to know more from the debtor in particular as to what harm is associated with permitting this claim to be asserted now. While it's not a matter for an evidentiary hearing, I think it's worth noting that my curiosity has at least been aroused by the role reversal associated with the current controversy. The principal party opposing this motion for stay relief is not the debtor, it's the creditors' committee. The debtor joined in the position articulated by the committee, but is hardly carrying the laboring law on this one. I'd like to know more about the debtor's position. I understand that the creditors' committee is a watchdog, but this watchdog is doing more than I think is appropriate in this instance. This is a situation in which the debtor should be asserting positions on behalf of the estate. For some reason it's in a joinder role, I want to know why. Is there anyone at

the debtor who has evaluated this, who has considered whether or not there is actual merit to the harm argument being made by the creditors' committee. I heard the argument, but I'm not particularly persuaded that there is cognizable harm to the estate, unless this is a situation in which a claim that would not otherwise exist is, in effect, being activated by the demand notice.

For that reason, I'd like some supplemental briefing in addition to a further evidentiary hearing. Are there really only two cases that deal with this subject matter. Or by analogy are there other situations in which courts have permitted notices to be given, not necessarily in the context of a guarantee, but in other settings. Or in which other action has been permitted in order to give a claimant the ability to pursue claims in bankruptcy by satisfying non-bankruptcy conditions precedent.

I suggest that the parties meet and confer regarding a schedule for both, the evidentiary hearing and supplement briefing, consistent with these remarks.

Meanwhile, the automatic stay will continue in affect because I'm not ruling. But when I do rule, as I will eventually, it will be as of today's date, nunc pro tunc.

Any questions? We're adjourned.

(Whereupon these proceedings were concluded at 4:13 p.m.)

I N D E X

R U L I N G S

I N D E X, cont'd

R U L I N G S

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

Lisa Bar-Leib

Digitally signed by Lisa Bar-Leib
DN: cn=Lisa Bar-Leib, c=US
Reason: I am the author of this document
Date: 2008.12.24 14:15:45 -05'00'

LISA BAR-LEIB

Veritext LLC

200 Old Country Road

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Mineola, NY 11501

Date: December 24, 2008

BCI EXHIBIT

51

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555(JMP); 08-01420(JMP)(SIPA)

- -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

- -x

In the Matter of:

LEHMAN BROTHERS INC.

Debtor.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

December 10, 2009

2:03 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

SECURITIES INVESTOR PROTECTION CORPORATION PROCEEDING:

I. CONTESTED MATTERS:

HEARING re Trustee's Motion Pursuant to SIPA § 78fff-2(f), Bankruptcy Code §§ 105(a) and 363(b), and Fed. R. Bankr. P. 9019(a) for Entry of an Order Approving the Trustee's Implementation of the LBI Liquidation Order to Complete the Account Transfers for the Benefit of Customers, Including the Related Limited Settlement Agreement for the Benefit of Private Investment Management Customers, and Terminating the Account Transfer Process

II. ADVERSARY PROCEEDINGS:

Bank of America v. Lehman Brothers Special Finance, Inc. [Adversary Case No. 08-01753]

HEARING re Motions for Summary Judgment

Veyance Technologies, Inc. v. Lehman Brothers Special Finance Inc. [Case No. 09-01535]

HEARING re Motion to Deposit Funds into Court Registry

III. RULE 60(b) MATTERS:

HEARING re Motion to Compel Production of Documents from the Trustee and the Committee Based on Privilege Waiver filed by Hamish Hume on behalf of Barclays Capital, Inc.

Transcribed by: Lisa Bar-Leib

Chapter 11 debtors.

Just so the record is clear, we don't have an objection. We would just like to clarify something that Mr. Kobak said with respect to language that was added to the order to address the concerns that both we and the committee had. I'm not sure if now is the time for us to rise and address that. I don't want to interfere with this argument; I just wanted to make sure that I had that opportunity.

THE COURT: You'll have that opportunity. I just want to make sure that the objectors as that class has been defined by Mr. Kobak have all had an opportunity to express themselves and to give the trustee's counsel an opportunity to respond if he wishes to, then we can hear from LBHI.

MR. KOBAK: Thank you, Your Honor. James Kobak, Hughes Hubbard & Reed.

I'll be brief. No one knows at this point whether there'll be a shortfall or not. We're doing our best to try to have the situation be that there won't be a shortfall. There is some possibility, I don't think we've ever said it's a likelihood, but there is some possibility that that could happen. I think we've made that very clear.

The statutory authority for transferring accounts is completely separate from the claims process. Basically, two remedies in the statute. Barclays agreed in the case of -- it would take us to take certain accounts I don't think they ever

agreed to take any accounts that only had REPOs in them. And that's just a function of the best deal that anybody could reach at the time this proceeding began. And as I say, there was always I think an understanding that most of the accounts would be transferred but there would be a residue of accounts that for one reason or another would not be transferred, and they would be part of the claims process. And that's exactly what's happened in this case. And there's no requirement that a net equity calculation or a determination that people could be paid 100 percent or anything else, has to happen before it's possible to do an account transfer. That may have been done in some other cases that were much smaller, but in a case like Lehman it would have been impossible for anyone to determine what the net equity might be. Whether there was any possibility of shortfall. What could be done with these accounts if people didn't take them.

And, frankly, Ms. Granfeld is here, but I think if people had gone to Barclays and said oh, Barclays wants to take the accounts but, by the way, maybe we can only transfer eighty percent of the property that goes with those accounts or ninety percent or seventy-five percent at least right away, I very much doubt that Barclays would have participated in any transaction like that. And the next time some liquidation like this happened, God forbid that it happens, but it happened once it could happen again, I think any potential transferee would

have real cold feet if they didn't know that there would be a complete transfer of property to go along with the accounts that they were going to have to administer for those customers.

THE COURT: I understand and appreciate the policy argument you just articulated, but can you respond to what I take to be the principal argument of the objectors who have spoken this afternoon, which is that at the end of the day this may be discriminatory as to their rights because certain customers are getting 100 cents and getting the benefit of transferred accounts while they're left behind in a claims resolution process in which, just using the REPO example, as but one example of that, they may later be determined to have rights as true customers, but they may suffer a shortfall thereby suffering discriminatory treatment relative to those customers who are benefited by today's motion.

MR. KOBAK: Yeah. I mean, I think I said in my opening remarks that in a sense there's always a potential that this kind of dichotomy can be discriminatory.

THE COURT: Is it your position then that that's okay?

MR. KOBAK: That's what the statute says. If Congress wants to write a new statute, they can write a new statute. But that is what the statute says. I think the trustee and SIPC have a tremendous amount of discretion to try to decide what's most efficient, what makes the most economic

BCI EXHIBIT

52

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555; 08-01420 (SIPA)

- -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., ET AL.,

Debtors.

- -x

In the Matter of:

LEHMAN BROTHERS INC.,

Debtor.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

December 11, 2009

10:00 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

HEARING re Motion to compel production of documents from the trustee and the committee based on privilege waiver, filed by Hamish Hume on behalf of Barclays Capital Inc.

Transcribed by: Penina Wolicki

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(TELEPHONICALLY)

P R O C E E D I N G S

THE COURT: Good morning. Be seated, please. I think we're starting with 60(b).

(Pause)

MR. HUME: Good morning, Your Honor. Thank you. Hamish Hume from Boies Schiller.

THE COURT: Good morning.

MR. HUME: Appearing for Barclays. I assume I may begin? You said we'd begin with 60(b)?

THE COURT: Proceed.

MR. HUME: Thank you. Your Honor, we're here, as you know, on a motion to compel production of attorney-client communications. It's not a normal motion. We don't do it lightly. But there has been a waiver here. The Rule 60(b) motions filed by all three of the movants place directly at issue what the attorney-client communications were at the time of the transaction.

The debtor recognized this, recognized that the arguments made by its special counsel, Jones Day, constituted a waiver, and agreed with us to produce attorney-client communications through to September 30, 2008, relating to the sale transaction. And therefore, Weil Gotshal's e-mails are being produced pursuant to that. The trustee and the creditors' committee have resisted. And that's why we're here today.

THE COURT: Let me stop you for a second, only because I'm trying to understand why you need this, even if you're right. If you have access to all of the attorney-client communications between Lehman Brothers and Weil Gotshal with respect to the sale transaction, don't you basically have everything you need?

MR. HUME: We may well. In fact, we think, Your Honor, we should win as a matter of law without having to get to these facts. But we're entitled to get to the facts based on what they're claiming.

THE COURT: Well, obviously, that's disputed. I'm just asking you a question as to need. Since most of what's involved relates to a very compressed time period, and I have a fairly distinct recollection of what was going on, at least from my perspective, during that time period, we're not talking about a vast array of documents, because there just isn't time to have created them. Nor are we talking about a lot of communications, because there are only so many days in that week. Since Weil Gotshal was principally involved as the transaction attorneys at that time, I don't understand why you need anything beyond what you already have.

MR. HUME: Let me try to answer. There are two other movants whose motions stand independently of the debtors'. If we defeat the debtors, we still have to make sure we defeat the trustee and the creditors' committee. And they make arguments

not about what the debtor knew in negotiating the deal but about what they knew. They make arguments -- the trustee makes an argument about what the trustee understood when he approved the contract. The creditors' committee make arguments about what they understood the contract to mean when they chose not to object to the contract.

THE COURT: Don't they most fundamentally, though, make arguments about what I knew or didn't know?

MR. HUME: They do, Your Honor. They do make those arguments. And we stand ready to defeat those on the merits. But they do make other arguments. Their oppositions to you focus on some of their arguments, but ignore the specific arguments that they make about what they knew about the contract and that they have to make, because otherwise they're defeated by the mandate rule.

They are trying to modify a sale order that was appealed, that the trustee defended on appeal, the creditors' committee chose not to appeal. Others appealed it, and it was affirmed. It was affirmed through appellate briefs that the trustee wrote and the debtor wrote, specifically citing to the clarification letter as part of the approved deal. Then it's affirmed. It comes back. A year later, they want to change the clarification letter and nullify it as if it was some big surprise. The only way -- we think, as a matter of law, that's it. The only way they can get around that is to make arguments

that they do explicitly make already, which is that there's something newly discovered about what the clarification letter meant, legally meant; what the legal interpretation of it was.

And, Your Honor, the Second Circuit, in the Eerie case, makes very clear that you can have an implied waiver of attorney-client communication if you put at issue your subjective reliance upon your legal understanding of something. They say -- they cite favorably in their explanation of why there was no waiver at Eerie -- they cite to the case -- an earlier Second Circuit case called Bill Zarony (ph.), where the defendant was accused of securities fraud. And he wanted to argue, I acted in a good-faith understanding of what the law allowed me to do. He did not say I am relying on what my lawyer told me. He said I acted in good-faith understanding of the law. And the district court judge says if you do that, I'm going to allow cross examination as to what your lawyers did tell you, because you've put at issue your subjective understanding of the law.

The Second Circuit agreed with the district court in Bill Zarony, and Eerie agrees with Bill Zarony. I don't think there's any other way to read to Eerie. Page 291 to 292, I believe -- or 228 to 229 of that Eerie decision discusses Bill Zarony in a way that makes clear, if you put your subjective understanding of the law -- and they have put their subjective understanding of the clarification letter at issue. And I'll

cite to you specifically, Your Honor, where they do that.

THE COURT: And when you say "they", you're talking about both the trustee and the creditors' committee?

MR. HUME: Exactly. And I'll do them separately. The creditors' -- of course, the trustee attaches an affidavit from its lawyer which is all about what he and his client understood the clarification letter to mean. I'll come to them second, because I think there's waivers in multiple ways there.

The creditors' committee, Your Honor, I would cite to you to section 5(b) of their brief where they argue under Rule 60(b)(2), that there's newly discovered evidence. That's a required element of their claim under Rule 60(b)(2). They have to show that they did not know subjectively, and objectively could not know, with reasonable due diligence. That's what 60(b)(2) requires as an element of their claim. Plus as I said, the mandate rule requires them to say there's something new here. The law of the case rule.

And they say, to give you one example, in paragraph 71 of their Rule 60(b) argument, they say, "It is newly discovered evidence that the clarification letter provided for Barclays to acquire all of the repo collateral in the repo transaction it took over from the New York Fed." As the Court may remember, that week the New York Fed was funding Lehman Brothers. During the course of the sale negotiations, the New York Fed asked Barclays to take over its funding position. Your Honor was

advised of that during the sale hearing by Harvey Miller, I think on page 63 of the transcript, if I'm remembering correctly, that Barclays had replaced the funding and received the collateral in connection therewith, and that that was one of the major changes in the deal, that that repo collateral was going to be the bulk of the purchased assets in terms of trading inventory.

The clarification letter says, "We think unmistakably and unambiguously the purchased assets shall include," instead of a number of things put in the asset purchase agreement, it says it shall include, "the securities owned by LBI and transferred to purchaser or its affiliates under the Barclays repurchase agreement as defined below." Paragraph 13 talks about the Barclays repurchase agreement, and also says, "We think unambiguously, effective at closing," I'm quoting, "all," let me say that again, "all securities and other assets held by purchaser under the September 18, 2008 repurchase agreement, among purchaser and its affiliates, LBI and its affiliates and Bank of New York, as collateral agent, shall be deemed to constitute part of the purchased assets."

They say it is newly discovered evidence that Barclays was acquiring all of the repo collateral, including the so-called haircut, which is the colloquial term for what they admit is a customary commercial practice for repo collateral to have a nominal value in excess of a repo loan. They say, we

didn't know you were getting the haircut. The agreement says we're getting all of it. They say it's newly discovered evidence that the contract means you're getting the haircut. That means they're saying, at the time, they understood, their legal interpretation of this contract, was that we weren't getting the haircut. That puts directly at issue what they and their lawyers thought about it at the time. And their lawyers were there.

I probably should have begun with this. Their lawyers were there that weekend at Weil Gotshal. The Court approved the sale, understand -- after being told there's a letter agreement that needs to amend the APA, because there are major changes to the deal. The Court was explicitly told that. There are major changes to this deal, and there's a letter agreement that's still being finalized.

The Court approved the sale and told the creditors, I think in substance, in the sale order, if there's a material change, you come back and tell me. That weekend, lawyers from Milbank, representing the creditors' committee, were at Weil Gotshal all weekend. Lawyers from Hughes Hubbard, representing the trustee, were at Weil Gotshal all weekend. They received drafts of the clarification letter as it was being drafted by Weil Gotshal and Cleary, representing Barclays. They received the briefings from Weil Gotshal and from members of the business people involved in the deal, repeatedly.

They received drafts that we now have in e-mails. They circulated drafts. Three o'clock Saturday afternoon they got a draft. They circulated it to their clients -- this is the creditors' committee lawyers. They sent it to their financial advisor at Houlihan Lokey. The draft, three o'clock Saturday afternoon already says clearly we get the repo collateral. We have that draft.

They get a big response back from Houlihan, "High Importance", Saturday afternoon. What did they say? We don't know. It's all redacted. It may well say, this looks like they're getting the haircut. And yet, they say it's newly discovered that we're getting the haircut.

It goes directly to what they say is newly discovered, and it rebuts it, and they put it at issue. And they know they have to put it at issue, because they're trying to modify an order that they chose not to appeal at the time. The only way they can do that is to say that this agreement they were shown repeatedly and that they studied and knew about, meant something different from what they now understand it to mean.

Hughes Hubbard, for the trustee, does the same thing even more explicitly. They have a section of their brief, (III)(c), where they claim mistake. Now, their brief begins with an argument about how the contract should be interpreted, that we think makes extremely strained interpretations, and then says, in what is a somewhat audacious position, if the

Court doesn't agree that the plain text of the agreement means what they say it means, then the Court should shred it, just nullify it. Because it was a mistake.

They do say it was a mistake, because it's different from what the Court was told. We disagree with that, strongly. But they also say -- and they ignore this in their briefing on this privilege dispute, in (III)(c) of their brief, they say it was also a mistake because it's different from what the trustee understood; different from his understanding of the contract. He got that understanding of his contract from his lawyer. His lawyers were there reviewing the contract. His lawyers executed the contract. His lawyers attach an affidavit saying, we didn't understand the contract to mean X, Y or Z. That's like saying I didn't understand that the securities laws prohibited me from doing X, Y or Z.

It's exactly the same thing the defendant in the Bill Zarony case wanted to say, and the judge there said, if you say that, I'm going to let them cross examine you on what you really did know about the law and what your attorneys really did tell you. And it doesn't matter that you're not explicitly saying my lawyers told me I could do it. It's called the doctrine of implied waiver.

And I think there's no way to read Eerie other than saying if it's a subjective state of mind about the law, the legal interpretation of a statute, or in this case a contract,

you've put it at issue. For example, the trustee's lawyer, in paragraph 13 of his affidavit says, "We understood", we. "We" is, me the lawyer and the trustee my client. My client and I understood the LBI estate was to remain in possession of the LBI assets in the DTCC clearance boxes. The clearance box assets, these unpledgeable, unencumbered, illiquid assets that were given to Barclays at the end of the deal to make up for a massive shortfall in the value of the repo collateral, which was also full of illiquid assets. A long story that we're going to explain to Your Honor. But the big issue here is the huge number of these assets were structured financial products that no one could value that week or really at any time, well, in twenty-four hours. But certainly not that week.

They say we understood. The clarification letter didn't give us -- didn't give Barclays these clearance box assets. That's what it says on the plain face of it. Purchase assets shall include, "such securities and other assets held in LBI's clearance boxes as of the time of the closing." There is no reference to not transferring clearance boxes in the DTC boxes, which are ninety percent of the clearance boxes. That's where all of them are, except the DTCC, the Depository Trust Clearing Corporation.

So the contract says, we think plainly, Barclays gets clearance box assets. They say we understood Barclays was not getting clearing box assets. "We", me the lawyer and my

client, didn't understand that. And therefore, if the Court agrees with this plain text, there's been a mistake. And it's newly discovered, so there's no mandate rule problem, and you have to nullify this contract. They put right at issue what their lawyers told them at the time. And again, the trustee's lawyers were there. They were getting drafts. The trustee and his lawyer, Mr. Kobak, billed a lot of time that weekend with time entries saying "review clarification letter; review and analyze clarification letter; negotiations over clarification letter."

They put it at issue whether that weekend they were saying it looks like they're getting all the clearance box assets. We want to disprove the notion that there's anything new here.

Now, I want to state very clearly for the record, Your Honor. You asked me why do we really need it? We should win as a matter of law. They are charged, legally charged, with the knowledge of the plain text of this contract. Your Honor approved this sale under extraordinary circumstances. And Your Honor was told there were major changes and there needed to be a letter agreement. That's what Weil Gotshal told you.

Parties went off and diligently did it. The creditors' committee were involved; Hughes Hubbard was involved. As a matter of law, they're charged with what's in this. We should win as a matter of law.

I know we talked earlier. We are ready for an evidentiary hearing, because we want Your Honor to understand what happened. It's complicated. Lots of difficult to value assets. We'll tell you everything. But we should win as a matter of law. And but if they're going to say that there's something newly discovered about the meaning of this contract, we are entitled to know what they thought it meant at the time and what their lawyers told them it meant at the time. That's our argument.

THE COURT: Okay. Thank you.

MR. MAGUIRE: If it please the Court, Bill Maguire of Hughes Hubbard for the SIPA trustee. Your Honor, this dispute with Barclays has nothing to do with the legal advice. It has everything to do with the representations that were made in this Court at the sale hearing. It has everything to do with that battleground and nothing to do with anyone's legal advice. And Barclay's position here disregards the trustee's papers, our own repeated confirmations that we're not relying on any privileged communications or legal advice, and the reality of what everyone knows happened here.

The trustee's papers explain how he was appointed just hours before the sale hearing began. He attended this hearing with his counsel, who was in absolutely no position to advise anyone as to the values of the assets and the liabilities that were the subject of this sale. There was obviously no time for

the trustee to go out and hire an investment bank to tell him what the valuations were. The only people who were in a position to know what the values of the sale here was, what the assets and the liabilities were, were the parties who had negotiated those terms without any input from the trustee. And those were two investment banks, Lehman and Barclays.

They came to this Court. They presented the terms. And they told the Court what the assets were, what the liabilities were, and they both specifically told the Court that there was no cash involved in the transaction. The trustee relied on those representations. That's what this dispute is about, not any legal advice.

And it's very significant that following the conclusion of the sale hearing here, in the wee hours of Saturday morning, between that time and the closing of the sale early Monday morning, no one, neither Lehman nor Barclays, ever told the trustee that any of the representations that had been made in this Court could not be relied upon. Barclays did not tell the trustee or his advisors that the assets that Barclays were acquiring were not going to be what had been represented to the Court, but were going to be billions of dollars more; or that the liabilities were going to be billions of dollars less. Or Barclays did not come to the trustee and say I know that we, Barclays, represented to the Court that there was no cash being conveyed here, but actually we are going to take cash. We're

going to take 1.4 billion dollars in cash.

There were no such advice, no such representations given by either Lehman or Barclays to the trustee following the sale hearing and before the closing. And therefore, the trustee relied upon the representations that were made in this courtroom.

I think that my colleague, Mr. Hume, misreads the cases and goes way too far when he says that by placing reliance on a representation that's made in the federal court, a party is thereby waiving a privilege. I don't believe any of the cases go anywhere near that, not in the Second Circuit under Eerie, and not in any of the cases even outside the Second Circuit that apply a much looser standard. In fact, he cites IMC, which applies the old deficient Hurn (ph.) test, which is clearly not law in the Second Circuit. And even there, the Court recognizes that where an attorney puts in testimony based on nonprivileged sources as to a party's contractual intent, there is no waiver.

The idea, quite frankly, that people can come to Court and they can bring their lawyer with them, they can hear what representations are made to the Court, but if they should dare to assert that they actually believed what they were told here, they are thereby waiving their privilege, that strikes me as a relatively revolutionary addendum to the law on privilege. I'll call it the Hume doctrine. It's one which I believe has

certainly no traction in this circuit.

Frankly, I think Barclays goes way too far with the idea that when somebody says this is what they believed based on nonprivileged communications, this is their understanding of a contract, they thereby waive their privileges. As we pointed out in our correspondence to Barclays, that would mean that Barclays is waiving all of its privileges, because Barclays of course is going to have its witnesses who are going to say that they have an interpretation of the contract and that's what they believed.

And so, the parties are now off in some skirmish. It is -- the Hume doctrine is an invitation to us all to explore our legal advice instead of focusing on the reality, the evidence and the truth of what actually happened here.

THE COURT: But that's very nice of you to give Mr. Hume a doctrine, but let's just focus on what I think he said, which is, the claims being made by the trustee here spring from an interpretation of the clarification letter. And during the weekend of September 20 and 21, 2008, counsel for the trustee was actively involved in the process of creating that document or at least reviewing it. And what he's saying is, how can you now seek to claim surprise with respect to that document, without putting at issue the advice given or the interpretations then understood with respect to the document.

I'm not sure that's the Hume doctrine as much as it is

at-issue waiver. So I'd like to focus on that for a little bit. I'm not sure that it's a controversial proposition if he's right, that that's what this case is about. If that's not what this case is about, then maybe you're right.

MR. MAGUIRE: Let me parse two things, Your Honor. One is the legal effect and the other is the economic effect. A party can perfectly understand the legal effect of a contract and still be entirely misled as to its economic impact.

Here there is no assertion by the trustee that he was misadvised by his counsel. He's not saying I entered into this contract because my lawyer blew it. That's not the basis for the trustee's papers. And Mr. Hume has access to all of the drafts. With respect to the clearance boxes, for example, he knows that the trustee was provided drafts of the clarification letter on Sunday night; and that one of those drafts had a reference to the DTC clearance boxes that he's talking about; and that then, Barclays entered into an agreement with the trustee and DTC in which all three parties expressly agreed that the accounts at DTC would be Excluded Assets, initial caps, defined term -- Excluded Assets -- so that DTC would be able to look to those assets to protect itself against the settlement obligations that Lehman had to DTC. They would be out of the sale, excluded. And he has discovery of the next draft of the clarification letter in which the word DTC was removed from the sentence "clearance boxes"; leaving Barclays

to get clearance boxes from anywhere else, like Euronext, but not DTC.

So all the fundamental evidence, Barclays has, as to the sequence and how the deal was negotiated, and exactly what information was provided to the trustee and to the trustee's counsel. It is, of course, a separate issue if Barclays is right, and despite our contractual arguments, Barclays is entitled to get everything at DTC plus all of the other disputed assets. If Barclays is right in its contractual assertions, which we find extravagant, and Barclays is entitled to all of those extra assets, then that adds to Barclays take from the sale many billions of dollars. And that means -- that would mean that the representations that were made to this Court would not have been right. And that, we believe, is something of great consequence.

So the economic effect is an important legal issue here, and is something that is understood entirely separately from legal malpractice or a lawyer's understanding, or what a lawyer advises a client about the legal effect of particular terms and conditions.

So I think if you pull those two things apart, what you have fundamentally is reliance by the trustee on the representations that were made to this Court about the values of the assets and the liabilities that were being transferred. The transaction that was described, the terms of the

transaction that were described specifically in terms of what Barclays would be getting, the consideration that would be flowing back and forth. So I think that is a very different thing from at-issue waiver, when somebody comes forward and says I signed this contract because I made a mistake about the legal effect of this provision.

THE COURT: All right. Thank you.

MR. MAGUIRE: I'd just say one last thing, Your Honor. And that is, there's absolutely no unfairness to Barclays here. Barclays has not identified any way in which it does not have full access through its own witnesses to what the trustee was told, his advisors were told. All of the third parties here have been subpoenaed. They're providing all of their documents. There is a voluminous record here. And so we respectfully submit Barclays' motion should be denied.

THE COURT: Okay. I'll hear from the committee.

MR. TECCE: Good morning, Your Honor. James Tecce of Quinn Emanuel on behalf of the official committee of unsecured creditors. Your Honor, my presentation this morning will touch on three overarching points. The first, that the creditors' committee does not rely on an attorney-client communication in support of any affirmative element of its claim; the second, that this motion is more focused on unearthing attorney-client communications to prove defenses to the claims that we have asserted; and third, there's no prejudice to Barclays, because

the information that it seeks is available from other sources.

The absolutely indispensible requirement for an at-issue waiver is reliance on an attorney-client communication in asserting a claim. The motion does not either expressly or impliedly identify an attorney-client communication let alone put one at issue. The relief requested, distilled to its essence in the committee's motion, is that relief from the sale order is warranted because the transaction presented to, reviewed by and approved by the Court does not comport with the transaction ultimately consummated. That position does not rely on the substance of attorney-client communication. Moreover, attorney-client communication is not relevant to that position. What is relevant is the disclosure made to the Court.

And even if attorney-client communications were relevant, as the Second Circuit's Eerie decision recognizes, "Privileged information may be in some sense relevant in any lawsuit. A mere indication of a claim or defense is insufficient to place legal advice at issue. Thus attorney-client communications must be more than relevant, they must be relied upon."

Barclays maintains the committee must establish that it filed its Rule 60 motion within a reasonable period of time and must identify "new evidence" demonstrating entitlement to Rule 60(b) relief. Barclays speculates that in satisfying both

of these elements, the committee must rely on attorney-client communications, and from that, Barclays deduces that an at-issue waiver has occurred. We respectfully disagree with that position.

With respect to the element of reasonable time and whether the committee filed its motion within a reasonable time, the committee will not rely on attorney-client communications to demonstrate timeliness. It will point to the committee's request for reconciliations. It will point to the responses to those requests. It will point to the need to secure Court intervention through Rule 2004 discovery. It will establish a timeline. And it will not rely on attorney-client communication to do so. At the conclusion of that evidence, the Court can make a determination as to whether or not the committee moved in a timely fashion.

With respect to the newly discovered evidence element, I think reading the text of Barclays' reply sheds light on the motivation behind this request. They state, "The committee's claim of new evidence requires it to show that the committee was not aware of anything it asserts as new evidence." The text of that argument reveals that Barclays is trying to unearth attorney-client communications to prove its defense. The affirmative element that Barclays identifies with respect to the committee's case is really that the committee must disprove Barclays' defense that the evidence is not new.

We have identified new evidence that was adduced from deposition testimony and document discovery in connection with the Rule 2004 motion. Barclays' defense is that that evidence is nothing new. But Barclays has to prove that defense by producing a witness or a document showing that the evidence is not new.

Secondly, the committee will not rely on attorney-client communications to show that the evidence was newly adduced. The starting point of this analysis is the sale hearing where the Court was advised of a 47.4 billion dollar transaction and 45.5 billion in liabilities and cure and comp liabilities. We have identified evidence unearthed during Rule 2004 discovery that shows that that record does not reflect the transaction that was consummated. And without going through the litany of evidence, it's significant to note, that among other things, a five billion dollar discount that was negotiated prior to the execution of the asset purchase agreement and was not reflected in the asset purchase agreement or the clarification letter, was learned of during that discovery.

And if there's any question as to whether the evidence adduced from the Rule 2004 is "new evidence", it's compelling to note that LBHI, which was the transaction component, is also seeking Rule 60 relief. It also considers that evidence to be newly discovered, and takes the position that its own

professionals were in the dark about material aspects of the sale transaction.

So Barclays cannot argue that the record adduced during the Rule 2004 discovery is inconsistent with the record at the sale hearing, which is the relevant analysis for purposes of new evidence. Barclays may take the position that new evidence is reviewed from the vantage point of the committee and new evidence involves an examination of what was known to the committee at the time. But again, in showing what was known to the committee, the committee will not rely on attorney-client communications. What the committee knew about the transaction is a function of what it was advised by third parties, like Barclays and Lehman.

The committee will recount what it was told about the transaction over the weekend following the sale hearing. And this is not a revelation, Your Honor. In opposing the December settlement, we submitted documents revealing what our advisors were told about the transaction over the weekend following the sale hearing. And when you compare that recitation with the newly discovered evidence, it becomes clear that there's a discrepancy between those two accounts. And if Barclays wants to test that assertion, Barclays can question our professionals about what they were told by third parties; Barclays can question third persons who spoke to our professionals about what they told our professionals; and Barclays can produce a

witness or documents showing that the committee knew about all material aspects of the sale transaction. But Barclays cannot mine the committee's attorney-client communications with the hope of disproving the committee's position.

Importantly, they're not prejudiced in their ability to secure evidence to test our assertions. And the absence of that prejudice is best demonstrated by examining the documents that they claim they need to see. For example, a summary of sale hearing e-mail that was sent by Milbank Tweed to the creditors' committee. Barclays maintains it requires that evidence to shed light on what the committee's professionals were told at the sale hearing and what the committee's understanding of what occurred at the sale hearing were. But what occurred at the sale hearing is a matter of public record, and Barclays remains free to take discovery of the third persons or the third parties that spoke to committee professionals about what those professionals were told; and they remain free to ask the committee's professionals about what they were told by third parties.

The second e-mail involves a summary of discussions following meetings at Weil Gotshal. But again, Barclays has access to persons who were at those meetings and can take discovery of those persons, as well as our professionals, about what they were told by those third parties.

With respect to the argument that the committee

misunderstood the clarification letter, this again is a defense by Barclays. The committee's point with respect to the clarification letter is clearly the clarification letter was neither presented to, reviewed by nor approved by the Court. That is the committee's claim with respect to the clarification letter. And notably absent from an analysis of that claim is any attorney-client communication or the relevance of any attorney-client communication.

This is really a defense. Barclays is maintaining that you had information all along to understand the clarification letter. And they may pursue that as a defense. But again, our claim is not relying on attorney-client communication. Our claim is that the clarification letter was never approved.

It's also an attempt by Barclays to clump the committee with LBHI and the SIPA trustee. The committee was not a party to the clarification letter. And for the record, the clarification letter made no mention of a previously negotiated but undisclosed five billion dollar discount that the committee maintains was a part of this transaction and was not disclosed to the Court. And if Barclays wants to take the position that that was clear from the clarification letter, it can do so, but that is a defense, and Barclays is not entitled to rely on -- it's not entitled to seek discovery or attorney-client communications to fortify its defense.

Barclays does not dispute as a legal matter that an adversary cannot put its opponent's attorney-client communications at issue through its affirmative defenses. We submit that we've moved within a reasonable time. We submit that we rely on new evidence. And we don't rely on attorney-client communications to make the affirmative claim -- those affirmative elements in our claim.

But Barclays wants to use attorney-client communications to refute them. And that's a fact that's emerged from this dispute, is that Barclays' position is that the committee always knew about the material discrepancies between the sale transaction represented to the Court and it acquiesced to those terms.

Indeed, Your Honor, the committee's knowledge lot would be a requirement that would have to be -- indeed, the committee's knowledge lies at the center of an acquiescence defense. The committee cannot acquiesce to something that it does not know about. And to the extent that Barclays pursues discovery about the committee's knowledge, it's really trying to fortify its own defenses.

And for the record, Your Honor, I think it's pretty -- I just want to be sure that the committee's position is clear. It never consented to this sale transaction nor does it consider its consent legally relevant. But using the at-issue waiver to pursue evidence to fortify a defense is not a

justifiable use of --

THE COURT: Let me break in there for one second, because I didn't understand what you said. Is it your position that the committee did not consent to the sale transaction?

MR. TECCE: Yes, Your Honor. Our position -- let me be clear. Our position was that -- is on the record at the sale hearing.

THE COURT: I remember what Mr. Despins said --

MR. TECCE: Correct.

THE COURT: -- at that time. And I think what he said was the committee -- and I'm paraphrasing based upon my recollection from over a year ago -- was not taking any position with respect to the sale transaction, and was not opposing it.

MR. TECCE: Correct.

THE COURT: So you're drawing a distinction between not opposing and consent?

MR. TECCE: No, Your Honor. I'm -- I think --

THE COURT: I just want to understand what you just said. That's all.

MR. TECCE: Sure. No, that's okay. I think Mr. Despins' statement is the statement that was made on the record. That is the committee's position. I think what Barclays is trying to say is that we were aware of the extent to which there were modifications to the sale transaction that

changed it, and we were aware of all material aspects of the sale transaction, and we signed off on them, we acquiesced to them. And I'm saying that that is absolutely incorrect.

THE COURT: Okay.

MR. TECCE: Coming to my conclusion, Your Honor. What matters most is what the Court was told, is what the Court approved, and whether that differs from what was consummated. And attorney-client communications have no bearing on an inspection of those disclosures and an examination of the ultimate results of the transaction.

In order to establish an at-issue waiver, which courts construe narrowly, Barclays must do more than simply manufacture attorney-client communication that may have tangential relevance or otherwise argue that attorney-client communications are relevant. Attorney-client communications must be relied upon.

Barclays is asking the Court today to set a very dangerous precedent for official committees of unsecured creditors. If Barclays prevails, committees will no longer have the comfort that in relying on professionals to assist them in the discharge of their fiduciary duties, communications with those professionals will not be sacrosanct and free from discovery, even if they do not rely on those communications in asserting a claim or defense. Unless and until the committee relies on an attorney-client communication to prove an

affirmative element of its case, Barclays cannot take discovery of attorney-client communications.

Just one other point that I would like to make is the discussion of Eerie this morning, Your Honor. Eerie involved a lawsuit filed by prisoners against the correction officers of that facility, arguing that the strip searches that were employed were unconstitutional. The defense that was raised by the officers was that they acted legally. And during discovery ten e-mails were unearthed which showed correspondence between the sheriff's office and the County Attorney's office. And that correspondence examined the legality of the strip searches and made recommendations on how to improve the searches so they became more compliant with legal standards.

The Court said that may be relevant, but it's not at issue. And the reason why it did that is because the defendants did not claim that they relied on their attorneys' advice and in reliance on that advice they acted properly. They argued simply that as a matter of law they acted properly. And that was an objective test. That is the claim here, Your Honor. It's an objective claim that the disclosures that were made to the Court did not accurately represent the transaction as consummated; that the clarification letter was never presented to the Court and never approved by the Court.

Our claim is an objective claim, and it does not rely on attorney-client communication. And if you have no further

questions, that concludes my presentation.

THE COURT: I have no further questions of you. But I do have a question that may go to LBHI or to someone who can comment with respect to LBHI's position. And here's a question that I have about this entire dispute. It appears that LBHI has considered the question of privilege waiver and has voluntarily opened up attorney-client communications to inspection by Barclays in connection with the 60(b) motion practice.

What I need to understand from LBHI is whether it did that in recognition that this was a case of at-issue waiver, or whether it did so for other reasons having to do with relations between LBHI and Barclays, other aspects of the bankruptcy case, the desire to avoid motion practice with respect to this question, or some other reason? In other words, what makes LBHI's situation distinguishable, if it is at all distinguishable, from the positions being asserted by the committee and by the LBI trustee?

MR. GAFFEY: Thank you, Your Honor. Robert Gaffey from Jones Day, special counsel to the debtor. It's a combination of those things, Your Honor, and I can lay them out and explain them to you.

First, it's a recognition -- it's my recognition that LBHI factually takes a position that does not apply to the other two moving parties. It was LBHI's counsel who were

making the disclosures to the Court at the sale hearing on the 19th of September, 2008. It was not counsel for the trustee, and it was not counsel for the committee, it was LBHI's counsel. And to the extent that what is at issue here -- and I think Your Honor properly focused on it -- is what Your Honor was told at the hearing, to the extent there's an at-issue point, I'm closer to at-issue than either of my friends, the trustee or the creditors' committee, because it's the disclosures that LBHI made to the Court.

So that was one reason that we determined it made more sense to agree with Barclays that we would make a voluntary waiver on negotiated terms, which are in the record on this motion before Your Honor in Mr. Thomas' affidavit. The other reason is, Your Honor probably -- as Your Honor infers, is the avoidance of motion practice. Given the fact that it was LBHI's counsel who made the representations to the Court regarding the sale transaction, I made the judgment that this was not one that we would take to motion practice, because I could see where the argument could be made that LBHI was distinct from the other two moving entities here.

The third reason, Your Honor, had to do with -- to be blunt about it -- a matter of policy. I came to this Court in June of 2004 on behalf of LBHI, and I asked the Court for broad ranging discovery, and made an argument to the Court about how it was important in a matter of this size and this importance

and this complication, that we get to the bottom of things and we have discovery. Having asked the Court for that relief, I didn't think it was appropriate to then say, when the disclosures that LBHI made were what are included in the facts to be determined, that LBHI would say well, you can't know what the privilege was.

Here's the real difference between us and the moving parties, I think, Your Honor. If you were to compare the three moving briefs here, each of us having made separate Rule 60(b) motions, LBHI has a point heading in that brief -- and I don't have our brief with us, but so I'm not sure I have the exact words here, but it says the lawyers -- the lawyers were not told of several fundamental aspects of the sale transaction that had been negotiated by the business people, in particular: the agreed five billion dollar discount from book value, as compared to an asset purchase agreement that said a book value position was being transferred; a write-up in the assumed liabilities that Barclays was supposed to take under the asset purchase agreement for compensation, and a write-up of the assumed liabilities Barclays was to take on under the asset purchase agreement for contract cure.

Now, in that section of our brief, I argue that LBHI's counsel was disabled. They were not able to make disclosure to the Court about this because they had not been told. If you don't tell Mr. Miller, he can't tell the Court. If you don't

tell Ms. Fife, she can't tell the Court. And I could see my way clear in analyzing the legal issue that if I'm going to take that position, that Barclays would be entitled to limited discovery within the attorney-client privilege. And that's why the agreement that I made with Barclays voluntarily was that they are entitled -- that we will produce -- we will not assert privilege with respect to communications between LBHI and its counsel regarding the sale transaction, and we put an end date on that that actually goes to September 30th.

And I can explain that eight day difference between the closing date and September 30th. It was just a recognition based on the paper trail that I had seen that there was some sort of dribble-out effect in the following days. And I didn't want to litigate those six days.

And with respect to the December settlement hearing which took place, I think, on the 22nd of December 2008, which I viewed as another opportunity for the parties to make disclosures to the Court about the transaction. And LBHI's lawyers who attended that hearing, although we didn't sign that settlement agreement, were -- remained disabled in terms of being able to make full disclosure to the Court, because they remained unaware of the five billion dollar discount, which was not revealed until August of this year, in the 2004 discovery that Your Honor ordered over Barclays' opposition.

So I think that answers your question, Your Honor.

It's as combination of: we're the debtor, we asked for extraordinary relief on the 2004 application, we've made an important motion, and I thought transparency was important from the debtors' point of view. My analysis of it was that unlike the other moving parties, I have put at issue what LBHI's lawyers knew or didn't know when they were before the Court on the 19th and have argued as a matter of fact that they were disabled from making full disclosure, because full disclosure had not been made to them.

THE COURT: Thank you very much. That's a very thorough and helpful answer.

MR. GAFFEY: Thank you, Your Honor.

THE COURT: Mr. Hume, do you want to discuss your doctrine further?

MR. HUME: Yes, Your Honor, if I may. And I agree with Your Honor, that it's not my doctrine, it's Second Circuit's holding.

THE COURT: I was simply making a very light joke.

MR. HUME: I understand. It's the spirit in which it was --

THE COURT: Very light and not particularly funny joke.

MR. HUME: Your Honor, I'll try to be brief in rebuttal. Let me pick up where Mr. Gaffey left off. It's not identical what the trustee and the creditors' committee say to

what Mr. Gaffey says. It's not a hundred percent identical, but it's very close and it's directly analogous. Because they ignore whole sections of their brief that rely upon what they understood the clarification letter to mean. They keep talking about the other sections of the brief where they talk about what the Court was told. And then they say, and we understood the clarification letter meant X, and so we didn't think it was a problem.

They have to make that argument that they didn't understand the clarification letter, because otherwise they can't tell you that the clarification letter was never approved. It's unbelievably audacious to come here a year later, given their review of this at the time -- this clarification letter -- to tell you it was not approved. They were there. They reviewed the drafts. They signed it, in the case of the trustee. They chose not to object in the case of the creditors' committee. They didn't object at the time; they didn't object within the ten-day rule for asking for a modification of the order. They didn't appeal. They could only say that what's in the clarification letter is different from what the Court was told if they say they misunderstood, legally, what the clarification letter means.

The five billion dollar discount that everyone keeps talking about, Your Honor, this discovery that Mr. Gaffey says came in August of this year, you know what it is? It's the

haircut in the repo. That's what he says in his brief. He says the five billion dollar discount ended up being the haircut in the repo. Mr. Tecce's client says in his brief it's newly discovered evidence that the clarification letter allowed for the whole repo collateral, including the haircut, to be a purchased asset. But that's what the clarification letter says.

And by saying that they didn't understand that at the time, they put directly at issue their legal understanding of this plain text of this written contract. Everyone understood that the repo haircut was in the deal. There are Weil Gotshal e-mails saying they understood it, that there weren't going to be settle-up payments, that it was a fifty billion repo. And we'll get to the merits of all of that.

There are also Alvarez & Marsal documents from right after the sale saying there's a reduction of about five billion from stale and inaccurate marks. This discount is taking illiquid assets that have been mismarked -- overmarked. And Barclays' saying, we do not think it's worth that. And then no one has time to do a complete valuation. I asked the trustee's representative in deposition this week, have you guys valued the assets? Yeah, we've been trying for a year. A year, they still haven't done it. You know why? Because a lot of it are structured financial products that are really hard to value.

This discount is the repo haircut. They say they

don't know the haircut was in the deal. It's in the contract. So what they're telling you, Judge, is we read the contract and didn't understand what it meant. That is the heart of their case, and they have to say it, because if they don't say it, they know they're way too late to come back and retrade this deal, which is all they're trying to do.

Finally, Your Honor, there is one other argument that we haven't -- I didn't -- neglected to touch on in my opening, which is -- the reason I neglected is they don't say anything about it in their briefs. Our opening brief says, wholly in addition to implied issue waiver, the trustee has made a selective disclosure of privileged communications. This is not -- when a lawyer gives an affidavit saying my client and I understood the contract meant X, Y and Z, they are disclosing their communications, their work product. But it's selective.

And there are scores of cases saying that is a selective disclosure. If you're going to do that, you entitle the other side to discovery. They're cited on page 14 to 16 of our brief. The trustee does not say anything about it in his opposition. So for a wholly independent reason, we have a selective disclosure waiver by the trustee.

Your Honor, if you have no more questions, I think those are the points I wish to make.

THE COURT: Okay. Thank you. Is there anything more from anybody else?

I'm going to take this matter under advisement and hope to provide a bench ruling at the next omnibus hearing, which I think is next week. I think it's December 16th. I don't think this requires an opinion in a formal sense, but I want to think about some of the issues that have been raised and give it a more deliberate and thoughtful judgment than I can give at this moment.

Thank you for the argument and for the briefing on this. It was all very well done. Thank you.

(Proceedings concluded at 10:54 a.m.)

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

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Date: December 15, 2009

BCI EXHIBIT

53

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

Adv. Case No. 08-01420(JMP)(SIPA)

Adv. Case No. 09-01480

- -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtors.

- -x

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff-Appellant,

-against-

LEHMAN BROTHERS INC.,

Defendant.

- -x

PT BANK NEGARA IndONESIA (PERSERO) TBK,

Plaintiff,

-against-

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

- -x

(continued on next page)

U.S. Bankruptcy Court

One Bowling Green

New York, New York

December 16, 2009

10:02 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

HEARING re Fee Committee Final Recommendations for Second Interim Applications

HEARING re LBHI's Motion for Authorization to Make a Capital Contribution to Aurora Bank

HEARING re Debtors' Motion for Approval of a Settlement Agreement Among Lehman Brothers Special Financing Inc., American Family Life Assurance Company of Columbus, and Others, Relating to Certain Swap Transactions with Beryl Finance Limited

HEARING re Motion of The TAARP Group, LLP Authorizing and Directing Immediate Payment of an Administrative Expense Claim

HEARING re Motion of Deutsche Bank AG to Permit Late Claim Filing Pursuant to Federal Rule of Bankruptcy Procedure 9006(b)(1)

HEARING re Debtors' Motion Pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure Requesting Joint Administration of Merit, LLC's Chapter 11 Case

HEARING re Debtors' Motion for a Determination that Certain Orders and Other Pleadings Entered or Filed in the Chapter 11 Cases of Affiliated Debtors be Made Applicable to the Chapter 11 Case of Merit, LLC

HEARING re Debtors' Motion Pursuant to Bankruptcy Rule 1007(c) to Extend the Time to File Merit LLC's Schedules, Statements of Financial Affairs, and Related Documents

HEARING re Motion of California Public Employees Retirement System for Relief from the Automatic Stay

HEARING re Motion of Banesco Banco Universal Requiring Lehman Brothers Holdings Inc. to Provide Requested Information and to Deem Claim to be Timely Filed by the Securities Programs Bar Date

HEARING re Motion of Pacific Life Insurance Company to File Proof of Claim After Claims Bar Date

HEARING re Motion of PB Capital to Include Certain European Medium Term Notes in the Lehman Program Securities List or, Alternatively, to Deem Such Claims to be Timely Filed by the Securities Programs Bar Date

HEARING re Debtors' Motion for Authorization to Implement the Derivatives Employee Incentive Program

HEARING re Debtors' Motion for an Order Approving Settlements with Bamburgh Investments (UK) Ltd. and Corfe Investments (UK) Ltd.

HEARING re Debtors' Motion for an Order Modifying the Automatic Stay to Allow Settlement Payment Under Directors and Officers Insurance Policies

HEARING re Motion of Merrill Lynch International for Relief from the Automatic Stay

HEARING re Motion of Malayan Banking Berhad for Examination of Debtors Under FRBP 2004

SECURITIES INVESTOR PROTECTION CORPORATION PROCEEDINGS:
HEARING re Motion for Order Approving Trustee's Allocation of Property of the Estate

HEARING re California Public Employees Retirement Systems' Motion for Relief from the Automatic Stay to Effect Setoff against LBI Funds Currently Held by Securities Finance Trust Company

PRE-TRIAL CONFERENCE re PT Bank Negara Indonesia (Persero) Tbk v. Lehman Brothers Special Financing, Inc.

HEARING re Motion to Compel Production of Documents from the Trustee and the Committee Based on Privilege Waiver filed by Hamish Hume on behalf of Barclays Capital, Inc.

HEARING re Motion of Official Committee of Unsecured Creditors of Lehman Brothers Holdings Inc., et al. for Letters of Request for International Judicial Assistance

Transcribed by: Clara Rubin

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THE COURT: Okay, does this mean that the complaint can be amended by stipulation without the need for motion practice?

MR. STREMBA: Yes, Your Honor.

THE COURT: Fine.

MR. STREMBA: Your Honor's permission is required, but I believe --

THE COURT: I hereby --

MR. STREMBA: -- everybody's consenting --

THE COURT: I hereby grant you permission.

MR. STREMBA: Thank you, Your Honor.

THE COURT: Okay.

MR. CHRISTENSEN: I believe the next matter on the agenda, Your Honor, are the Rule 60(b) motions. With the completion of the pre-trial, that concludes my business before the Court, and I ask to be excused.

THE COURT: So you may be excused.

MR. CHRISTENSEN: Thank you, and I'll turn it over to those who are here for the 60(b) motions.

THE COURT: All right, I'm going to provide a bench ruling with respect to the motion that was argued last week in which Barclays Capital asserted that the filing of 60(b) motions by each of the creditors' committee and the trustee and the LBI SIPC case constituted an at issue waiver of the attorney-client privilege. Here's my ruling.

At the outset, the Court examines the relevant law governing the attorney-client privilege. This privilege exists to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interest in the observance of law and the administration of justice. See Morande Auto Group v. Metropolitan Inc., 2009 WL 650444 at *2 (D. Conn., Mar. 12, 2009). Accordingly, courts in the Second Circuit have exercised great caution when construing rules resulting in the waiver of the privilege. Per re: the County of Erie, 546 F.3d 222 at 228 (2nd Cir. 2008). An excerpt from that case, "Rules which result in the waiver of this privilege and thus possess the potential to weaken attorney-client trust should be formulated with caution."

Generally, courts have found that parties implicitly waive the attorney-client privilege in three factual scenarios. When a client testifies concerning portions of the attorney-client communication, when a client places the attorney-client relationship directly at issue, and when a client asserts reliance on an attorney's advice as an element of a claim or defense. County of Erie, 546 F.3d at 228. It is this third instance of at issue privilege waiver on which Barclays relies. County of Erie sets forth the applicable legal standard in the Second Circuit for determining implied at issue waiver of attorney-client privilege. That case defined the test as whether the moving party can prove that the opposing party

"relied on the privileged communication as a claim or defense, was an element of a claim or defense." 546 F.3d at 228. County of Erie examined whether e-mails exchanged between a county attorney's office and sheriff's office concerning strip searches were admissible in a lawsuit challenging their constitutionality. The defendants in that case invoked an objective, qualified immunity defense in that they believed their conduct had been legal. County of Erie, 546 F.3d at 229. The Second Circuit held that the defendant's reliance on an objective, rather than subjective legal defense did not constitute at issue waiver. As stated in that case, "Petitioners do not claim a good faith or state of mind defense. They maintain only that their actions were lawful or that any rights violated were not clearly established. In view of the litigation circumstances, any legal advice rendered is irrelevant to any defense so far raised."

Moreover, the Second Circuit emphasized that a finding of waiver requires actual reliance on privileged advice, whereas the "mere indication" of privileged advice is "insufficient to place legal advice at issue." Under the test as enunciated in Erie, then, the 60(b) motions filed by the trustee and the committee did not implicitly waive the attorney-client privilege with respect to their advisor's knowledge and understanding of the sale transaction. Despite Barclays' arguments to the contrary, the claims asserted by the

trustee and the committee in the 60(b) motions do not rely on any legal advice provided by their respective advisors, with regard to the sale transaction. Instead, these claims rely on allegedly misleading and incomplete public representations made to the Court at the sale hearing and on the alleged failure of Barclays and certain Lehman executives to say anything to contradict those representations. In other words, the claims asserted by the trustee and the committee in the 60(b) motions constitute what I'll call objective claims, asking the Court to compare in-court disclosures concerning the sale transaction with the provisions of the sale transaction as actually consummated. Neither the trustee nor the committee asserts claims based on their subjective state of mind at the time of the sale hearing.

The Court is also not persuaded by Barclays insistence that the context of the claims of the trustee and the committee and the 60(b) motions means that they necessarily waive the attorney-client privilege. At bottom, Barclays seems to argue that reliance that purported mistakes and newly discovered evidence means that the claims for relief under Rule 60(b) necessarily implicate the contemporaneous advice provided by professionals for the trustee and the committee at the time of the sale hearing. Based on the Court's review of these motions, the Court disagrees. The committee argued at the hearing and in its 60(b) motion that the newly discovered

evidence underlying its 60(b) motion consists of discovery unearthed during the Rule 2004 investigation, purportedly demonstrating misrepresentations and nondisclosures related to the sale transaction. The trustee's 60(b) motion makes clear that his arguments, with respect to mistakes, are, in fact, premised on insufficient disclosure to the Court. Thus the 60(b) motions simply do not implicate and rely on the advice given by attorneys.

This holding on at issue waiver comports with widely-recognized principles of public policy. The attorney-client privilege is critically important to ensuring open and frank communications between attorneys and their clients. For this reason, policy considerations weigh in favor of strictly construing any implied waivers of the privilege such as urged by Barclays.

Barclays is not unfairly prejudiced by this holding because other means exist for it to obtain relevant information in support of its defense to the 60(b) motions. The agreement by LBHI to share otherwise privileged information is certainly one important source.

Additionally, Barclays remains free to pursue discovery from third parties that provided information to the committee and the trustee's advisors concerning the sale transaction. Accordingly, Barclays is not worse off in that it has not been denied access to information vital to its claims.

See County of Erie 546 F.3d at 229.

Moreover, should it become apparent at a later date that the claims of the trustee or the committee as actually presented, do, in fact, rely on legal advice provided by their respective professionals, then Barclays remains free to assert an at issue waiver at that time and seek additional related discovery.

Finally, the fact that LBHI has agreed to produce otherwise privileged documents to Barclays is not relevant to any purported privilege waiver by either the trustee or the committee. The trustee and the committee are not similarly situated to LBHI with respect to the current dispute.

As mentioned by counsel for LBHI on the record at the hearing, LBHI viewed itself as distinct from the trustee and the committee because LBHI made representations to the Court with respect to the sale transaction at the sale hearing and LBHI initiated the Rule 2004 discovery from Barclays. LBHI also based its 60(b) motion in part on the contention that its attorneys were kept in the dark with respect to changes in the sale transaction.

The motion by Barclays is denied without prejudice to bringing a later motion should it become clear at some future date that the committee or trustee is relying on privileged communications to support 60(b) relief. That's the ruling of the Court.

The next item is a motion by the committee. If people wish to leave at this point or change their seat that's fine.

MR. TECCE: Good afternoon, Your Honor. James Tecce of Quinn Emanuel on behalf of the creditors' committee. First, let me state at the outset, Your Honor, I appreciate sincerely your entertaining the motion at this hearing. I know that it was not originally scheduled for this time. I understand the Court is extremely busy and I am going to be brief in my presentation this afternoon.

THE COURT: Before we get started, what happened here just in terms of the schedule because I had been advised that this was off calendar --

MR. TECCE: Correct.

THE COURT: -- and then I was advised this morning it was back on?

MR. TECCE: Your Honor, we had two motions on calendar for today on the 10 o'clock agenda; this motion and a Rule 2004 motion. We adjourned the Rule 2004 motion but we inadvertently adjourned this one as well. We had no intention of doing that, it was fully briefed and the parties were ready to go forward, it was just a mistake.

THE COURT: Okay, well, happily I reviewed this before it was adjourned so I'm as ready for it as I'm going to be.

MR. TECCE: Thank you very much, Your Honor.

Your Honor, the committee motion asks the Court to

issue two letters of request for international judicial assistance pursuant to the Hague Convention. The committee submits that the motion does not seek extraordinary relief. Indeed, the committee styles the motion as a procedural motion because of the discreet nature of the relief it is requesting.

I note also that the motion is joined by LBHI with respect to the Financial Services Authority or the FSA request and the PricewaterhouseCoopers U.K. request. And LBI joins the motion with respect to the FSA.

If the Court grants the committees' motion, it will transmit two letters of request to the High Court in the United Kingdom which will then issue document requests to the two proposed respondents, the FSA and PwC. Both respondents will be given every opportunity to defend against the subpoena in the English courts. Today, we are simply asking the Court to take the necessary first step in that process that enables us to pursue relief from the United Kingdom.

With respect to the two respondents, the FSA and PwC, the committee notes that the committee transmitted copies of the motion papers on November 25th to both of those respondents. The committee has since met and conferred with the FSA through a telephone call dated December 3, 2009 and indeed we attach our correspondence with the FSA in connection with our reply papers.

The committee also has received indications from

senior justice -- from Senior Master Whitaker from the Queen's Bench Division that he will leave a calendar date for Monday, December 21 should the Court grant the motion today. That day will be available for the committee to present their letters of request at this hearing. The Court -- it's anticipated that the Court will schedule a fixture, which I understand is an English term for a future date, for argument and final disposition of the application, again, should the Court grant the motion today.

We submit that ample justification exists to grant the motion when the documents that we're requesting are not only relevant but are important to the Rule 60(b) litigation. The movants allege in that litigation that Barclays realized billions in profits from the sale transaction that were not disclosed to the Court. To that end, the narrow document request to seek disclosure that go to approval of the sale transaction by Barclays' regulators. The regulators evaluation of Barclays' results announcement in 2009 and Barclays' independent auditor's evaluations of the assets acquired in the sale transaction and the results announced in the results announcement. Certainly, these documents are relevant and they have probative work.

What's more, there is no alternative means to secure the discovery while Barclays has indicated that it may agree to produce its correspondence with the FSA and while that offer is

appreciated and would help, it would not result in the production of FSA's internal documents including its contemporaneous notes from meetings with Barclays' executives.

Barclays has also indicated that it would consider providing documents, it's -- strike that.

Barclays has also indicated that it will provide documents it supplied to PricewaterhouseCoopers. But, again, that would not result in the production of internal work papers from its independent auditor. And while Barclays has indicated that it will consider instructing PwC to do so, we have no assurance that PwC will, in fact, produce those work papers.

Barclays is the only objector to this motion, Your Honor. They are not a respondent with respect to the subpoena. The thrust of their objection is that the factual predicate upon which the motion rests is inaccurate and Barclays challenges relevance on that basis. But we will not dispute today Barclays' assertions and we note the Court's analysis should focus on whether the documents are relevant to the Rule 60(b) motions instead of deciding whether the Rule 60(b) movants have conclusively proven their claim.

The committee submits that it has satisfied the relatively low legal hurdle of demonstrating the documents are relative. The committee alleges a flat transaction was approved but one resulting in billions in profits was consummated, and to that end documents concerning the approval

of that transaction by Barclays United Kingdom regulator and its independent auditors is highly relevant.

Lastly, Your Honor, Barclays maintains that issuing the letters of request would undermine interest in the United Kingdom.

First, we're not asking the Court to direct the production of these documents in violation of U.K. law. Instead, we are simply asking the Court to take the first step in letting us pursue the production of the documents in the United Kingdom. The FSA, PwC and even Barclays can contest the discovery before the English court. But we cannot initiate that process in the first instance without issuance of the letters of request.

Secondly, Your Honor, we are not seeking pretrial documents as that term was understood in the United Kingdom. If this were a Rule 2004 application or a similar, quote, unquote, "fishing expedition" Barclays might have a point. The movants are not seeking to depart on a train of inquiry that might produce trial evidence. Instead, they are seeking disclosure in connecting with -- in connection with an existing litigation that is scheduled for argument and possibly trial.

Third, to the extent that there are confidentiality issues and concerns, they can be handled by the United Kingdom court.

Today's motion and the enter of this order is not a

finding on confidentiality issues. It can be addressed another day in the United Kingdom. Because the documents are located beyond the Court's subpoena power, however, there is a precondition to starting that process that the Court issue the letters of request, of course, subject to everyone's rights to debate confidentiality and other issues in the appropriate forum in the United Kingdom. Unless Your Honor has any questions, that concludes my presentation on the motion.

THE COURT: I have no questions.

MR. TECCE: Thank you very much.

MR. THOMAS: Your Honor, Todd Thomas from Boies, Schiller & Flexner on behalf of Barclays and I'm here with Jonathan Schiller who I believe Your Honor knows.

We oppose this motion simply because we don't believe the legal standard has been met. Movant has emphasized the relatively low Rule 401 standard of evidence, but, in fact, under the comity analysis that this Court must do the factor that must be considered is the, quote, "importance" of that information, not just its relevance. Here, we don't believe the information is relevant and certainly don't believe it is important. With respect to the PwC papers, we have offered -- Barclays has offered to provide and will provide two movants the information that Barclays provided to PwC in order to allow PwC to do their audit.

Barclays has also offered and produced two movants

information that Barclays prepared for its valuation of the assets. If movant would like to challenge those valuations, they are able to do so without seeing PwC's internal audit papers. They understand what the assets are and they have the ability to go and do their own valuation of those assets if they want.

With respect to the FSA internal work papers, again, Barclays has agreed to look for any official correspondence it had with the FSA and to produce those documents. So what we're talking about is just the internal regulatory papers of the FSA. We don't believe those are relevant to this proceeding. Some of those, in fact, don't even relate to this deal but relate to the prior pre-bankruptcy deal which did not occur.

Additionally, we attach to a supplemental filing a letter from the English FSA which they asked us to present to the Court and we agree with FSA's conclusion as noted in our brief that this request is also procedurally in conflict with English law which is another consideration for the Court under its comity analysis.

We believe that the requests are not to the degree of specificity required under the law. That's a point that the FSA made in their letter. And I would note that the standard in one of the cases cited by movants in the reply brief in terms of how specific the requests must be, it's the Westinghouse case which is 3 W.L.R. 430 at 24 and 25 reads,

"The description should be sufficiently specific to enable the person to put his hand on the document or the file without himself having to make a random search. In short, specifically to know what to look for." And, Your Honor, we believe -- we agree with the FSA these requests are much broader than that. And, in particular, the FS -- the request with respect to PwC are even broader than the FSA request.

Additionally, we also agree with the FSA's point that this is improper procedurally under English law because it is seeking confidential information.

THE COURT: Let me ask you something that occurs to me as I'm hearing your argument. PwC and FSA are not here making these arguments; Barclays is. Are you doing this with the direction and authority of PwC -- PwC and FSA or are you just doing this on your own? Because the appearance is that you're trying to stonewall discovery.

MR. THOMAS: Your Honor, we are simply here objecting to it because we don't think the legal standard has been met.

THE COURT: Yes, but let me -- just answer the question which is a simple one. Did PwC and/or FSA ask Barclays to carry its argument here so that they didn't have to appear in court and do it, or are you simply doing it on behalf of your client?

MR. THOMAS: Your Honor, the FSA asked us to present the letter to the Court. I do not believe any of the

communications could be construed as formally authorizing us to appear on their behalf. So we are preparing just on Barclays behalf but we did -- we were asked by the FSA to present this letter to the Court.

THE COURT: Okay. And this is a question that I guess I'll raise both with you and committee counsel and counsel for others who are joining in the committees' motion, which is whether any of these issues that you have raised can be raised on December 21st in front of the High Court at a time when English law can be interpreted by an English judge as opposed to my purporting to interpret English law across the Atlantic. I assume that the answer to that is yes.

MR. THOMAS: Yes, Your Honor. If I might add, it is also part of the analysis that the U.S. court, we believe, is intended to engage in before even sending it across the seas because of the comity factors.

THE COURT: Well, in what respect is comity implicated in your objection? It seems to me that courts in the United Kingdom and courts in the United States have a shared interest in getting at the truth. And since the 60(b) motions being prosecuted here by LBHI, LBI and the committee all raise fairly significant questions about the truth being withheld. It strikes me as a curious posture for you to be in to be preemptively saying we don't want you to know the truth; we only want you to know what we want to tell you from our

records.

MR. THOMAS: Your Honor, we certainly don't want to be in that posture.

THE COURT: I'm sure you don't.

MR. THOMAS: No. And we have provided extensive discovery including all our work papers and we certainly welcome alternative valuations of those assets and we are simply pointing out the courts have emphasized that U.S. courts need to carefully scrutinize applications of this type. But beyond our just pointing out that we don't believe the legal standards have been met here and that we provided most of the information.

THE COURT: Could you explain to me why the legal standard is not met?

MR. THOMAS: We believe because movants have not demonstrated that the internal work papers of FSA, the regulatory body, with respect to a pre-bankruptcy deal, Your Honor, for example, that was not consummated would be important to this litigation.

THE COURT: Let me tell you why I think it might be. One of the things about this transaction that's highly unusual and I think everybody who has observed this case recognizes it, is that the transaction happened very quickly. It could not have happened that quickly had the parties not been engaged in extraordinarily intense pre-bankruptcy negotiations the week

before. So the fact that there was a bankruptcy filing and a changed transaction is certainly very significant. But if Barclays had come in fresh that week, there hardly could have been a transaction consummated within four or five days. That's just not humanly possible. So I think that there is a connection to what, at least in my mind, to what happened pre-bankruptcy and what happened post-petition and I'm certainly interested in knowing about it.

MR. THOMAS: Very well, Your Honor.

THE COURT: Okay. After that comment from the bench, I'm not sure if anybody wants to say anything more.

I'm prepared to grant this motion for the reasons that I've articulated. In doing so, however, I recognize that this is a matter which is delicate because it goes to the heart of institutions in the United Kingdom and confidential -- potentially confidential work papers of PwC and potentially confidential internal records of the FSA. I leave it to the High Court to determine issues of relevance, the appropriateness of the discovery and will be guided entirely by what the U.K. court decides. In authorizing this opportunity to obtain discovery in the U.K., I by no means mean to suggest anything about how a U.K. court should decide the issue once it's presented there. So all issues that have been raised here by Barclays can be raised there by PwC, FSA and Barclays and a U.K. judge can decide whether or not the discovery is

appropriate. Anything more?

MR. TECCE: Your Honor, I do have just one point and I apologize for this. In one of their requested documents we had misstated a date, Number 5, of the FSA's request. The date should be 19 September instead of 22 September. So if we -- when we submit a form of order to the Court electronically, we were going to make that change.

THE COURT: If it's simply changing a typographical error I assume there's no controversy.

MR. THOMAS: No, Your Honor.

THE COURT: Fine.

MR. TECCE: Thank you very much, Your Honor.

THE COURT: There are three matters from this morning's calendar that I adjourned to the afternoon, so anybody who wants to come up to hear the bench ruling Banesco Banco Universal and PB Capital, this is a time to do that.

(Pause)

THE COURT: It's lonely up here.

UNIDENTIFIED SPEAKER: I represent Pacific Life; it's very lonely up there.

THE COURT: The Court will read into the record a ruling with respect to the late filed claims of Banesco Banco Universal and PB Capital. As I indicated during this morning's calendar, I've given active consideration to the Pacific Life Insurance Company matter which is of a somewhat similar nature